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ACCESS TO COURT RECORDS

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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30 June 2006

The Hon Mark Burton
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

Dear Minister

I am pleased to present to you Law Commission Report 93, *Access to Court Records*, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Sir Geoffrey Palmer', with a horizontal line underneath.

Sir Geoffrey Palmer
President

FOREWORD

The rules governing access to court records are currently not easy to find, nor are they clear, comprehensive or consistent across jurisdictions. Although most court hearings are in public, access to court records is not so open. This report recommends a new approach. We consider that court record information should be more generally available in accordance with the principles of open justice and freedom of information, unless there are good reasons for withholding the information. This approach is consistent with that of the Official Information Act 1982, and we recommend the enactment of a Court Information Act that follows a similar policy framework: a presumption of open court records limited only by principled reasons for denying access. Such reasons would include protection of sensitive, private or personal information, particularly in cases involving children.

We recommend that the new Act empowers the making of access rules for all jurisdictions, and establishes an advisory committee for consultation in the drafting of these rules. This committee should have a membership similar to the High Court Rules Committee, supplemented by representatives from all jurisdictions to ensure uniformity and consistency of all the rules as far as possible. This report makes recommendations regarding the content of the court record, and concerning access to records at various stages of case proceedings. There needs to be greater access to material before the court at the time of the hearing than at present, to ensure accuracy of reporting, and allow public understanding and scrutiny of court proceedings. We recommend a separate procedure for researchers requiring access to records.

The commissioners responsible for the reference were Frances Joychild (whose term came to an end in February 2006) and Sir Geoffrey Palmer, President of the Law Commission. The researchers and writers were Rachel Hayward and Janet November. Our thanks also go to Helen Colebrook and Ella Lucas for their research at an early stage of the work.

ACKNOWLEDGEMENTS We are indebted to a number of people and organisations whom we consulted during the research period of this reference and to those who made very helpful comments on an earlier draft of this report. In particular, we acknowledge the valuable assistance of Hon Justice Hugh Williams, Chair of the Criminal Practice Committee; Hon Associate Judge J Doogue and His Honour Judge M Abbott; our peer reviewers, Professor John Burrows and Robert Lithgow; Steven Price; the Office of the Ombudsmen; AL Hart, Registrar of the Royal Federation of New Zealand Justices Associations Inc; John Edwards; Hugh Rennie QC; Dr Peter Spiller; George Tanner, Chief Parliamentary Counsel, Ian Jamieson, Deputy Chief Parliamentary Counsel, and Hugo Hoffmann, Parliamentary Counsel; and the many staff of the Ministry of Justice who explained how their systems operated and patiently answered our questions.

We are also indebted to a number of overseas contacts for responding extensively and promptly to our email and other requests for information about the operation of their systems, particularly to Dr Karen Gottlieb, US Attorney and State Court Consultant; Anne Wallace, Deputy Executive Director of the Australian Institute of Judicial Administration; Assistant Professor Teresa La Master, Assistant Dean for Technology Affairs, Chief Information Officer and Lecturer in Law at the University of Maryland; Carole Burry (Records Management Services), Diane Bach (HM Court Service's Departmental Records Officer) and Sally Attwood (Research Unit) of the Department of Constitutional Affairs in England.

We thank the following for their useful submissions on the consultation draft of this report:

The Rt Hon Chief Justice, Dame Sian Elias on behalf of herself, the Chief Judge of the High Court and the President of the Court of Appeal

Their Honours the Chief District Court Judge R Johnson and Judge F McElrea for the District Court Judges

His Honour Judge G Colgan, Chief Judge, Employment Court

His Honour Judge RJ Bollard, Principal Environment Judge

His Honour Judge P Boshier, Principal Family Court Judge

His Honour Judge A Becroft, Principal Youth Court Judge

Professor Jeremy Finn on behalf of himself, Catharine Coleborne, David Williams and Grant Morris as members of the Australia and New Zealand Legal History Society

Dianne Macaskill, Chief Archivist

Richard McElrea, District Coroner, Christchurch

Blair Stewart, Assistant Privacy Commissioner

The Ministry of Justice

The Civil Litigation and Tribunals Committee, Criminal Law Committee and Family Law Section of the New Zealand Law Society

David Hastings, Deputy Editor, *New Zealand Herald*

The Media Freedom Committee of the Commonwealth Press Union (New Zealand Section)

Television New Zealand Ltd

GB Wickins, Accredited Collections, B&D Holdings Ltd

TERMS OF REFERENCE

The Commission will review the existing rules governing access to court records and make proposals for any changes that are necessary and desirable. In particular, the Commission is asked to consider:

- 1 What documentation held by a court or tribunal (hard copy and other) should form part of the court record and, in particular, what administrative documents are included.
- 2 What should be the principles and rules upon which access to court records can be granted or withheld, and specifically:
 - (a) What is the relationship between these principles and rules and those underpinning the Official Information Act 1982, the Archives Act 1957 and the Privacy Act 1993?
 - (b) How does the format of the court record, whether it be hard copy, electronic or other, affect any of these principles or require additional considerations?
 - (c) Should there be special rules when requests for access are:
 - (i) by accredited news media; or
 - (ii) for research and statistical purposes?
 - (d) Should there be a single access code across and within all court and tribunal jurisdictions or specific codes?
 - (e) What are the principles upon which fees for accessing court and tribunal records should be fixed?
- 3 What should be the principles and rules governing disclosure of documentation held by a court or tribunal which is not part of a court record?
- 4 What should be the principles and rules under which court staff operate when handling access requests?
- 5 What should be the principles and rules governing:
 - (a) the archiving of court records; and
 - (b) access to court files and records that have been transferred to National Archives?



Executive summary

THE NEED FOR CHANGE

- 1 The courts in New Zealand are the third arm of government, and are entrusted with the administration of justice according to law. They constitute an essential part of our democratic framework. What they do, and how they do it, endures as a matter of important public interest.
- 2 General agreement exists that the administration of justice should be conducted openly and in public so far as possible. Secret trials are not tolerable in any democracy that respects the rule of law. The principle of open justice is fundamental in New Zealand court proceedings. Court trials almost always are in public, although there are certain hearings to which the public and press are not admitted. However, access to the court record is not so open. In our view, this information should generally be more accessible.
- 3 Our examination of the issue of access to information held by the courts has found that, where they exist, the current rules are drawn from a variety of different sources. 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.
- 4 Our recommendations in this report provide a framework of principle upon which the law can rest, and set out the conditions of access in order to produce as much clarity and certainty as possible. However, the result in every case may not be predictable; in some cases a number of principles and factors will have to be balanced by a judge.

THE NEW APPROACH

- 5 The terms of reference given to the Law Commission revolve around one main issue. Under what circumstances should members of the public be able to access information held by the courts? Our view is that, in accordance with the principle of open justice, information should generally be available, unless there are good reasons for not permitting access. We consider that the approach set out in the Official Information Act 1982 fits with this principle and should be used as a legislative framework for access to court records.
- 6 In 1982, when the Official Information Act was passed by Parliament, New Zealand committed itself to generous access to public information within the executive branch of government. The Danks Committee, whose recommendations led to the Official Information Act, found that the courts were excluded from their terms of reference, and thus made no recommendations about them. The Committee expected that its proposals would, in due course, affect practice in the courts. We now fulfil that expectation.

- 7 The approach of the Official Information Act 1982, with its presumption of availability unless there are good reasons for withholding information, has been tried and tested over a long period in New Zealand. The Official Information Act principles as adopted in New Zealand have been widely admired as progressively making public information available. A number of international observers who have looked at the New Zealand approach have commended the Act, in comparison with more prescriptive approaches in other countries.
- 8 In broad terms, the Official Information Act framework, which succeeded in the executive branch of government, should be used for access to court records with necessary adaptations. That is not to say that the access measures in the court structure should be exactly the same as those for the executive government. We are satisfied they cannot be. The courts exhibit unique features that must be taken into account and respected.
- 9 The administration of justice is not the same as the administration of public policy in all respects, and court records are different in nature to government records. The particular characteristics of litigation and litigants need recognition in any new framework so that personal information and individual privacy can be adequately protected. However, the underlying principles are open justice, and the public interest in the accountability of the judicial process and the administration of justice. In accordance with these principles, the presumption should be that court information will be made available unless there is a good reason to withhold it. There will need to be a culture change in courts in favour of this presumption of accessibility.

THE NEW FRAMEWORK: THE COURT INFORMATION ACT

Presumption of accessibility

- 10 We recommend the enactment of a Court Information Act to cover all court record information held by a court. The purpose would be to increase access to court records within principled limits. A presumption of accessibility to court information should apply, with exceptions where there are conclusive reasons for withholding the information, and potential exceptions where there are good reasons for withholding the information. The Act should provide for specific rules of court to govern the detail of access to those records.
- 11 Our terms of reference oblige us to look at what constitutes the “court record”. At present, there is no clear definition in New Zealand as to what constitutes the “court record”. We take the view that the record should comprise the case file used by the court to decide the case and any appeals, and include any administrative information on the file, and also any records concerning a particular case that are to be found on case management systems. But it would not include judges’ notes and drafts. The legal definition would include any transcripts of evidence, affidavits, depositions, bail documentation, briefs of evidence, pleadings and submissions, as well as judgments, orders and exhibits, together with documents of an interlocutory nature or concerning case conferences. We have labelled this information the “case file”. The court record would also include “other records”, such as registers and indexes, calendars and daily lists and electronic recordings of hearings, most of which contain information about more than one case.

- 12 The starting point would be that all court record information is presumptively accessible. Conclusive reasons for withholding should include situations where allowing access would be likely to: prejudice the maintenance of the law, including the prevention, investigation and detection of offences, and the right to a fair hearing; endanger the safety of any person; prejudice the proper administration of justice; or endanger the security or defence of New Zealand.
- 13 There should also be good reasons for withholding information, although these might be outweighed in a particular case by other considerations which would make disclosure appropriate in the public interest. These reasons would include where:
 - the information would disclose a trade secret or unreasonably prejudice a commercial position;
 - the case file relates to a proceeding under listed statutes, relating to Family Court, Youth Court or mental health matters, or a defamation proceeding, or a property dispute arising out of an agreement to marry;
 - withholding the information is necessary to protect an obligation of confidence;
 - withholding the information is necessary to protect the privacy of natural persons;
 - allowing access to the court record would be contrary to court order.
- 14 Information would also be withheld if it would be contrary to another enactment to release it. An example of this would be records that are not to be disclosed because of the provisions of the Criminal Records (Clean Slate) Act 2004.

Access rules

- 15 The appropriate mechanism for the detailed regulation of access to information in court records is to promulgate clear and explicit rules of court for all jurisdictions, consistent with the presumption of accessibility and the reasons that justify withholding information. The new rules should be set out in schedules to the Act, or in subordinate legislation. The Court Information Act should contain an empowering section for the making of the rules, and a requirement that these rules be consistent with the purposes of the Act. The purposes and the temporal framework for access must be taken into account in settling the precise content of the rules. The Act should also establish an advisory committee to be consulted as to the content of the rules.
- 16 In relation to access to case files, the rules need to be sensitive to the stage that the case is at, the type of case and the type of requester (for example, a party to a case, or member of the public, journalist or researcher). A number of variables need to be taken into account of a temporal kind. Has the case been heard? Has it been decided? How long ago was the case dealt with? These temporal issues potentially make a difference to whether access should be allowed, and we recommend temporal guidelines be set out in the Act.

Temporal guidelines for access rules

- 17 We recommend that, for the purposes of devising access rules, a judicial proceeding should be considered in four stages.
 - Period 1: pre-hearing (from the commencement of the proceedings until the commencement of the substantive hearing).
 - Period 2: during hearing (from the commencement of the substantive hearing until 28 days after the end of the proceedings).
 - Period 3: post hearing (from 28 days after the end of proceedings) to transfer to Archives New Zealand.
 - Period 4: after court records are transferred to Archives New Zealand.
- 18 Although the principle of open justice continues throughout the four periods, good reasons for withholding information may be stronger in some time periods than others.
- 19 We further recommend that in some time periods some requesters (such as the parties to a case) may be entitled to more information without leave than other requesters. This report does not attempt to determine the exact content of the rules, but it does make recommendations concerning who would be entitled to what information in the various periods, and in the various jurisdictions. These recommendations appear in chapter 5.
- 20 In some kinds of cases (particularly those relating to family law or mental health law) there may be good reasons for withholding personal information in all periods, especially where it is sensitive material about children or people who are disabled. Good reasons may also exist where the court, in the course of adjudicating on the case, has suppressed publication of particular information or evidence.

Appeals

- 21 The Court Information Act will provide a right of appeal from any decision to refuse access to information. There should be one appeal as of right and further appeals to a higher court only by leave.

Advisory Committee membership (to be set out in the Court Information Act)

- 22 We recommend that an advisory committee for the access rules be established by statute, with a similar membership to the High Court Rules Committee, but supplemented by additional members. While there will need to be one set of rules for access to records in criminal cases and another for civil cases (because they are governed by different procedural and substantive law), we recommend that all access rules be settled in consultation with the same advisory committee to ensure uniformity and consistency as far as possible.
- 23 The rules should be as simple and clear as possible. Within the fundamental civil–criminal distinction there will need to be some special rules for particular jurisdictions. For example, in Family Court cases, privacy considerations take on an enhanced importance compared with the business in other courts. Further, there are now statutory restrictions on rights of search in matters such as adoption and it is not proposed to disturb these.

Fees

- 24 Fees for access to information held by the courts should be governed by the same principles that govern charging under the Official Information Act 1982 and should be regulated by similar charging guidelines. Full cost recovery is not appropriate.

The media: special provisions?

- 25 We have heard complaints, particularly from the media, about the lack of access to some categories of information held by courts. We recommend that there be affirmative obligations on all courts to make available information concerning future hearings by way of on-line access to court calendars.
- 26 We have considered whether there should be any special rules that apply to representatives of the media. We consider that there need not be any statutory provisions. However, we have made some recommendations that will assist the media and aid accurate reporting and the free flow of information to the community concerning the judicial process. Many members of the public have a special interest in what transpires in the courts and rely on the media reporting. We do think efforts need to be made by the court authorities to liaise satisfactorily with the media.

Researchers' access

- 27 The Court Information Act should provide for a process of dealing with bona fide research projects that require access to court records, for reasons connected with public policy or other benefits. We recommend statutory provisions enabling the setting up of a Ministry of Justice committee to consider all research proposals requiring access that would have the final say, after consultation with the judges, on whether access was to be granted, and under what conditions. The process would be managed and supported through the Research, Evaluation and Modelling Unit of the Ministry of Justice.

Court information in archives

- 28 The principles and rules for access to court information should continue to apply to court records that have been archived in Archives New Zealand (previously known as National Archives). For the purposes of the Public Records Act 2005, the Chief Justice or Head of Bench of the court concerned should be considered the administrative head who classifies court records as open or restricted as appropriate.

Operational rules

- 29 The terms of reference required the formulation of rules for court staff handling access requests. We consider that it is most appropriate for these to be drawn up by the Ministry of Justice once the access rules have been drafted, because issues will arise during the drafting process of the rules. However, we have included suggestions for operating the access rules in practice.

RECORDS IN
ELECTRONIC
FORMAT

- 30 Where records are held in electronic form, the ease with which information can be retrieved, manipulated and transferred has significant privacy implications, which require additional consideration for access rules, particularly in relation to allowing remote public access to court records. Where documents are held in electronic format, should they always be accessible in that format? Should that access be on-site at the court house, or should people be able to access court documents over the Internet?
- 31 Given the relatively limited availability of court documents on the Internet in New Zealand, and the fact that e-filing is in its early stages here, we have the advantage of being able to learn from the experience of overseas jurisdictions that are more advanced in terms of court records held and made available in electronic format. We recommend that steps be taken to ensure that the development of appropriate policies to deal with the issues raised keep pace with technological advances in e-filing systems and capability in New Zealand, and with any moves to increase Internet access to court records.
- 32 There are a number of measures that could be introduced in the future to reduce the risk of erosion of privacy or threats to security, including limiting remote public access to certain files or documents, or excluding it entirely, redacting (or editing) personal information contained in electronic court files, and allowing applications to seal particular documents.

TRIBUNALS

- 33 The terms of reference invited us to consider the position of the approximately 100 tribunals that exist in New Zealand. We examined this issue and, having consulted staff at a number of tribunals, concluded that the special character of many tribunals made any general approach dangerous unless we had the opportunity to examine each of them. Time precluded that. We recommend, therefore, that once our general approach is implemented, the Act passed and the rules made as recommended, then the issue of applying the new framework to tribunals should be pursued.

Chapter 1

Current rules

- 1.1 There is no comprehensive regime governing access to court records. Some jurisdictions currently have no specific rules for access to their records. In other jurisdictions, access to court records is governed by rules of court, many of which have the status of statutory regulations. Power to make rules or regulations generally vests in the executive, rather than Parliament. However, regulations must be approved by Cabinet and laid before the House of Representatives.¹
- 1.2 Unlike other court rules, such as the District Courts Rules 1992, and the Criminal Proceedings (Search of Court Records) Rules 1974, the High Court Rules do not have the status of statutory regulations. They are to be found in the second schedule of the Judicature Act 1908, and are part of that statute.²
- 1.3 The rules relating to access to court records in criminal cases are found in the Criminal Proceedings (Search of Court Records) Rules 1974, and section 71 of the Summary Proceedings Act 1957.

RECORDS IN CRIMINAL CASES

Criminal Proceedings (Search of Court Records) Rules 1974

Application of the rules

- 1.4 The Criminal Proceedings (Search of Court Records) Rules (criminal records search rules) apply to all proceedings for offences under the Crimes Act 1961, whether heard in the District Court, High Court, Court of Appeal, or Supreme Court,³ including preliminary hearings in the District Court.⁴

1 Regulations (Disallowance) Act 1989, s 4. See G Palmer and M Palmer *Bridled Power* (4 ed Oxford University Press, Melbourne, 2004) ch 11 regarding the making and controlling of regulations/subordinate legislation. The empowering section in the relevant Act will be scrutinised by Parliament and by its Regulations Review Committee.

2 They are made by the Governor-General in Council, with the concurrence of the Chief Justice and any two or more members of the High Court Rules Committee: see Judicature Act 1908, s 51C. The rules so made can alter or revoke or amend any former High Court, Court of Appeal or Supreme Court Rules. This means they do not need to go through the parliamentary process for revision, even though they are part of an Act, for reasons of efficiency. In practice, the High Court Rules Committee is entrusted with the drafting and amending of the rules. For the composition of the High Court Rules Committee, see Judicature Act 1908, s 51B.

3 See Crimes Act 1961, s 409.

4 *Ameriy v Mafart (No. 2)* [1988] 2 NZLR 754, 757.

- 1.5 Views differ as to whether these rules extend beyond the Crimes Act to other indictable offences. Some cases indicate that they apply only to proceedings under the Crimes Act 1961, and not to indictable offences created under other statutes, such as the Misuse of Drugs Act 1975.⁵ Another view, and that adopted by the Ministry of Justice, is that they apply to all criminal proceedings in the High Court, and any other non-Crimes Act offence cases where there has been a jury trial or a preliminary hearing in the District Court.⁶
- 1.6 The criminal records search rules do not apply to summary proceedings, although they are often applied by analogy in the summary jurisdiction. They do not override express provisions in Acts, regulations or other rules.

Content of the rules

- 1.7 Rule 2(1) provides that any person may search, inspect and copy:
- The registers of people committed for trial and sentence, more commonly known as the Return of Prisoners Tried and Sentenced, and the index to those registers.⁷
 - Any document on a file relating to criminal proceedings if a right of search or inspection of that document is given by any Act, or if the document constitutes notice of its contents to the public.⁸
- 1.8 Parties and their solicitors have the right to search, inspect and take copies of the file, without payment of a fee,⁹ subject to any judicial direction,¹⁰ unless there is more than one defendant, in which case leave of a judge is required.¹¹ This right has been interpreted by the courts as having a temporal limit – the party must be currently a party to a criminal proceeding.¹²
- 1.9 Except for these express provisions, no one may search, inspect or copy the Crown Book without leave of a registrar or judge,¹³ or any file or document relating to a criminal proceeding without leave of a judge.¹⁴ There is no guidance in the criminal records search rules or the Crimes Act 1961 as to how the judge's discretion to grant leave should be exercised.¹⁵

5 *L v Police* [2000] 2 NZLR 298, para 20.

6 Ministry of Justice, Guidelines for Staff, *Dealing with Requests for Information about Criminal Cases or Access to Criminal Files*, version 1, 9 February 2004, para 3.

7 In practice, to accommodate the requirements of the Criminal Records (Clean Slate) Act 2004, the Ministry no longer allows general searches of these registers. This issue is discussed more fully later in this chapter.

8 For the purposes of the rules, “document” includes the record made of oral evidence given at any hearing (but not any notes made personally by the judge); all exhibits produced in evidence; and the record made of the reasons given by the judge for his or her judgment, but not any personal notes made thereof by the judge – Criminal Proceedings (Search of Court Records) Rules 1974, r 2(9).

9 Criminal Proceedings (Search of Court Records) Rules 1974, r 2(2).

10 Criminal Proceedings (Search of Court Records) Rules 1974, r 2(4).

11 Criminal Proceedings (Search of Court Records) Rules 1974, r 2(3).

12 *R v Wira* (1989) 5 CRNZ 266, *R v Greer* (4 June 2003) CA197/01 Glazebrook, Hammond and O'Regan JJ. The Court of Appeal indicated that the right subsists during the currency of the proceeding and any associated appeal period.

13 The Crown Book contains a record of all criminal cases, including details of the charge, judge and result.

14 Criminal Proceedings (Search of Court Records) Rules 1974, r 2(5).

15 In *R v Mahanga* [2001] 1 NZLR 641, 650, the Court of Appeal noted that this points to an intention to confer a broad judicial discretion as to whether leave should be granted.

- 1.10 The criminal records search rules contain a general right to access and copy documents from criminal proceedings commenced more than 60 years ago.¹⁶ In practice, many such documents are likely to have been sent to Archives New Zealand, or destroyed.

Rules applying to summary proceedings

- 1.11 In summary cases, the registrar must keep a record of all criminal proceedings in the District Court,¹⁷ and may give a copy of an entry or an extract of the Criminal Records to any person who can demonstrate a genuine and proper interest in obtaining it.¹⁸ In cases of doubt or difficulty, the registrar may refer the matter to a District Court judge, whose decision will be final.
- 1.12 In practice, anyone requesting a copy of an entry from the Criminal Records must do so in writing, and must advise the registrar why they are requesting the information, and how they intend to use it.¹⁹ Parties do not have an automatic right to search or copy their files in summary proceedings.²⁰
- 1.13 Although the criminal records search rules do not apply to Summary Proceedings Act matters, the High Court has held that they should be applied by way of analogy.²¹ This approach has been adopted by the Ministry of Justice in its guidelines for staff in the summary and Youth Court jurisdictions, with the proviso that any requests to search files (including requests by parties) must be referred to a judge.²²

Case law relating to the Criminal Proceedings (Search of Court Records) Rules 1974

Purpose of the rules

- 1.14 Most New Zealand case law relates to access applications after proceedings are completed and often after final disposition of all appeals. In the last 20 years, there has been a shift in the approach of the courts to the exercise of discretion to allow access under the rules.
- 1.15 In 1988, the High Court described the principal purpose of the criminal records search rules as being to ensure that, from the conclusion of the trial, the privacy of defendants would be protected by the Court, unless there was some sufficient reason for disclosing material on the file. The Court recommended adopting a cautious approach to the exercise of its discretion under the rules.²³

16 Criminal Proceedings (Search of Court Records) Rules 1974, r 2(8).

17 Summary Proceedings Act 1957, s 71.

18 Summary Proceedings Act 1957, s 71(4).

19 Ministry of Justice, above n 6, para 4.1.2

20 Ministry of Justice, above n 6, para 4.2.2. Section 71 of the Summary Proceedings Act 1957 is silent on this matter.

21 *L v Police*, above n 5.

22 Ministry of Justice, above n 6, para 3.

23 *Amerly v Mafart* [1988] 2 NZLR 747, *Amerly v Mafart (No. 2)* above n 4.

- 1.16 In *R v Philpott*,²⁴ the High Court took a different view, finding that the principal purpose of the criminal records search rules was to confirm and enhance the Court's supervisory powers over material on the file, and to rationalise the basis for dealing with requests for access to it. The broad approach was that the record (that is, notes of evidence and exhibits) was to be protected from automatic search, subject to limited exceptions. The applicant had to show some sufficient reason for the grant of access, but exceptional circumstances were not required. The Court held that it must exercise a broad judicial discretion, balancing the reasons advanced by the applicant, the legitimate claims for privacy that defendants have after the conclusion of a trial, and any other relevant circumstances.
- 1.17 In *L v Police*,²⁵ the High Court held that judges should adopt a cautious approach to requests under the search rules, including balancing freedom of information against rights to privacy, but otherwise not leaning against denying leave to people who could demonstrate a genuine and legitimate interest in searching and copying parts of the file.²⁶ While the Official Information Act 1982 did not apply to courts, the trend towards availability of information under the Act, and openness in litigation generally, were factors that could be taken into account in considering whether to grant leave to non-parties to search and copy court files.

The approach in Mahanga

- 1.18 In *R v Mahanga*,²⁷ the Court of Appeal adopted a balancing approach to the criminal records search rules. Mr Mahanga was convicted of murder. His trial was filmed by Television New Zealand (TVNZ). The police produced a videotape of an interview with the defendant, and TVNZ recorded the showing of the videotape during the trial, but the resulting sound was of poor quality. TVNZ applied for access to use the original videotape in a documentary. The High Court denied access to the tape, and its decision was upheld by the Court of Appeal.
- 1.19 The Court of Appeal considered that the purpose of the criminal records search rules was not to protect the privacy of defendants in the absence of strong reasons for allowing access, but rather to confirm and enhance the Court's supervisory powers over material on court files, and to rationalise the way requests for access were dealt with. The values reflected in the principles of open justice and freedom of expression were relevant to the exercise by judges of these supervisory powers.
- 1.20 Rather than advocating a cautious approach to the exercise of the judicial discretion under rule 2(5), the Court of Appeal preferred to describe the approach required as one of determining which of the competing interests applicable should prevail. Relevant considerations include:
- any legitimate privacy concern raised by an accused;
 - the purpose, if known, for which access is sought;

24 *R v Philpott* (14 February 1991) HC WN T74/90, 3 Eichelbaum CJ.

25 Above n 5, also reported as *L v Police and Wilson & Horton Ltd* (2000) 17 CRNZ 257.

26 *L v Police*, above n 5, para 32.

27 *R v Mahanga* [2001] 1 NZLR 641.

- the principle of open justice, especially where applications are made for access to court records by the media;
 - the interests of administration of justice where there is a risk that they will be harmed by disclosure;
 - in some cases, fair trial rights may be affected and should be weighed.
- 1.21 In marginal cases, the purposes of the Official Information Act 1982, and the principle of availability of information should influence the exercise of judicial discretion.²⁸
- 1.22 Having weighed the competing interests in the case, the Court of Appeal concluded that the trial and appellate judges had regard to all the relevant factors, and were not plainly wrong. The appeal was dismissed.

Developments since Mahanga

- 1.23 There have been a number of recent decisions relating to access to criminal records that have applied the approach set out in *Mahanga*. This sometimes requires a complex balancing of competing values and interests.
- 1.24 In *R v Wharewaka*,²⁹ the High Court considered an application by TVNZ for leave to search exhibits for the purposes of a proposed documentary. Baragwanath J held that the effect of section 14 of the New Zealand Bill of Rights Act 1990 is that a presumption of openness will apply where there is no countervailing public interest. The difficult cases are those where Bill of Rights Act values conflict, either between themselves, or with another recognised public interest, in this case privacy.
- 1.25 The Court found that where privacy competes against freedom of expression, there is no question of automatic priority, nor any presumption in favour of one rather than the other.³⁰ The question is the extent to which it is necessary to qualify one right to protect the underlying value protected by the other. The extent of the qualification must be proportionate to the need. Baragwanath J considered that approach to be consistent with the approach taken by the Court of Appeal in *Mahanga*.
- 1.26 In 2005, the High Court considered another application for access to the videotapes of the pleas entered by the defendants in relation to the Rainbow Warrior bombing for the purposes of a documentary marking the twentieth anniversary of the bombing.³¹
- 1.27 The Court noted that once the trial was complete, while open justice and freedom of expression remain relevant to the balancing exercise under the criminal records search rules, they are not of direct application.³² However, here the public interest was not outweighed by the privacy interests of the respondents, or by the circumstances under which the tape was created. The Court was most

28 Above n 27, 651.

29 *R v Wharewaka* (8 April 2005) HC AK CRI-2004-092-4373 Baragwanath J.

30 His Honour adopted the approach taken in *Douglas v Hello! Ltd* [2001] QB 967.

31 *Television New Zealand Ltd v Mafart and Prieur* [2005] DCR 640.

32 *Television New Zealand Ltd v Mafart and Prieur*, above n 31, para 41.

influenced by the significance of the event in New Zealand history, the essentially public nature of a plea and corresponding lack of privacy,³³ and the fact that the respondents had consented to the tape becoming part of the record.

- 1.28 The High Court authorised the searching and copying of the tapes. The respondents appealed, but the Court of Appeal dismissed the appeal for lack of jurisdiction. This decision was recently overturned by the Supreme Court, which held that the Court of Appeal has jurisdiction to hear the appeal, and remitted the matter to the Court of Appeal for determination.³⁴
- 1.29 In *Jackson v Canwest*,³⁵ the appellant appealed from a High Court decision allowing TV3 to copy a videotape of a police interview with the appellant and broadcast it as part of a documentary. The Court of Appeal found that, while the judge had not referred to the criminal records search rules in his decision, referring instead to the In-Court Media Coverage Guidelines, in fact the exercise he undertook was a *Mahanga* style balancing of interests.³⁶ The Court found no basis on which to interfere with his exercise of discretion.

Other matters relevant to the exercise of discretion

- 1.30 The cases demonstrate other matters that may be relevant to the exercise of judicial discretion to grant access to criminal records:
- the risk of prejudice to a trial, for example, where a trial is imminent and likely to attract public notoriety and so the risk of prejudice is high;³⁷
 - where an applicant seeks access to materials for research or commentary, there is an interest in ensuring that they have access to an accurate record of what was said in court, rather than having to rely on recollection;³⁸
 - where matters have been publicly given at trial, and have received extensive media coverage.³⁹ In such cases, access may be more likely to be granted.

Right of appeal

- 1.31 Until very recently, there was doubt about the jurisdiction of an appellate court to entertain an appeal in relation to applications to search, inspect or copy criminal records. In 2005, in *Mafart v Television New Zealand Ltd*, the Court of Appeal held that a High Court decision under the criminal records search rules could not be the subject of an appeal under section 66 of the Judicature Act 1908, because that section authorises appeals only in civil proceedings, and Parliament

33 *Television New Zealand Ltd v Mafart and Prieur* above n 31 para 62.

34 *Mafart and Prieur v Television New Zealand Ltd* [2006] NZSC 33.

35 *Jackson v Canwest* (4 May 2005) CA111/04 McGrath, William Young and O'Regan JJ. The appellant had been found not guilty of the murder of his partner on grounds of insanity, and was detained as a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

36 *Jackson v Canwest*, above n 35, para 36.

37 *R v Murray* (11 September 1995) HC HAM T11/95 Hammond J, refusing an application for access to hand up depositions.

38 *Amery v Mafart (No. 2)*, above n 4, 760, where Gault J granted access to the Judge's sentencing notes because they were simply a text of what was said in open court at the time of sentencing.

39 *R v Philpott*, above n 24.

has not conferred any appeal right in this area under the Crimes Act 1961, or any other Act.⁴⁰ Its decision was recently overturned on appeal by the Supreme Court.⁴¹

- 1.32 The majority of the Supreme Court concluded that an application for access to court records, whether of criminal or civil proceedings, is a civil proceeding.⁴² Accordingly, the appellants had a statutory right of appeal under section 66 of the Judicature Act 1908.⁴³ The Supreme Court noted that issues that arise on applications under search rules generally may involve matters of considerable private and public importance.⁴⁴

CRIMINAL RECORDS (CLEAN SLATE) ACT 2004

- 1.33 The Criminal Records (Clean Slate) Act 2004 provides that persons convicted of certain relatively minor criminal offences may have their criminal records concealed seven years after the conviction if they have not re-offended in the interim. The legislation does not apply to records in respect of any person convicted of an offence resulting in any form of custodial sentence,⁴⁵ and excludes people who have committed sexual offences against children and young persons. The Act came into effect on 29 November 2004.

- 1.34 The Ministry of Justice, Department of Corrections and law enforcement agencies must not disclose the criminal records of eligible individuals (subject to certain statutory exceptions).⁴⁶ The Ministry of Justice Case Management System (CMS) database has been modified to comply with the requirements of the Criminal Records (Clean Slate) Act.⁴⁷ The Ministry has adapted its practice in allowing searches of hard copy registers, to accommodate the requirements of the Act. Requesters must provide the name of a specified individual, and court staff will check the registers and either provide a copy of the relevant entry, or, if the Act applies, advise that there is no information held or able to be released.

PROPOSED CHANGES TO CRIMINAL PROCEEDINGS (SEARCH OF COURT RECORDS) RULES 1974

- 1.35 In 2004, the Criminal Procedure Committee, a committee chaired by Justice Williams, produced new draft search rules to apply to criminal trials in the District Court, High Court, Court of Appeal and Supreme Court. Further work on the proposed new rules has been deferred pending the completion of the Law Commission's report.

40 *Mafart v Television New Zealand Ltd* (4 August 2005) CA 92/05, Anderson P, Chambers and O'Regan JJ.

41 *Mafart and Prieur v Television New Zealand Ltd*, above n 34.

42 While Eichelbaum J concurred with that result in this case, he did not consider that it was possible to determine in advance that all applications under the criminal records search rules would be civil applications – *Mafart and Prieur v Television New Zealand Ltd*, above n 34, para 59.

43 *Mafart and Prieur v Television New Zealand Ltd*, above n 34, para 40.

44 *Mafart and Prieur v Television New Zealand Ltd*, above n 34, para 48.

45 This includes any type of corrective training, periodic detention, home detention, borstal or detention centre training.

46 Criminal Records (Clean Slate) Act 2004, s 16. Currently, most applications made to the courts division of the Ministry of Justice and the Police are made by prospective employers and insurance companies to whom individuals have delegated their rights to seek access to personal information. The Ministry of Justice receives approximately 100,000 applications each year for criminal record information.

47 When an application is made to view a person's criminal record, the system assesses whether there is material to which the Act applies. If it does, these details will not be released to the requestor, although the original information will still remain on CMS. An individual is entitled to access both their own clean slate history and their full history.

- 1.36 The Committee approached the task of drafting the rules by considering the components of the average criminal file, and coming to a wide definition of a file of record, which essentially includes all documents held on the criminal file, and an administrative section that includes correspondence. The documents on the file are specifically listed, together with a catch-all category of “any other documents or components of the file of record”.
- 1.37 The Committee then considered who should have access to the file as of right, on application, or not at all. The proposed rules contain three time bands: Period 1, from creation of the file until the disposition of all appeals; Period 2 being the lesser of 10 years after the disposition of all appeals or one month after the date on which parole is granted under the Parole Act 2002 for the relevant accused, and Period 3, the period thereafter. The rules provide for different levels of access at different periods in the life of a criminal record.
- 1.38 The draft rules are a considerable improvement on the present situation. They specify for applicants and court staff exactly which documents are available automatically and which require the judge or registrar’s prior permission before access can be granted, and open up categories of information that, at present, require the permission of the judge to access, allowing increased access to criminal records, while still protecting sensitive information. However, the Committee noted in its draft that, without an amendment to the Summary Proceedings Act 1957 to confer rule-making power under that Act, the proposed new rules could still only apply by analogy to summary offences.

YOUTH COURT

- 1.39 There are no provisions expressly covering access to Youth Court files in criminal proceedings. Court staff are advised to apply the Criminal Proceedings (Search of Court Records) Rules 1974 by analogy, but any request for information from Youth Court files must be referred to a Youth Court judge for consideration.⁴⁸
- 1.40 Access to information from care and protection files is governed by rule 9 of the Children, Young Persons, and Their Families Rules 1989. The rule provides that records may be searched by a party, their solicitor or agents, a barrister or Youth Advocate representing the child or young person, or a lay advocate supporting them, any Care and Protection Coordinator or Youth Justice Coordinator, the Commissioner for Children (or his or her authorised representative), and any other person who satisfies the registrar that he or she has a proper interest in the proceedings.
- 1.41 However, the registrar has an overriding power to decline a request for inspection if the registrar considers that it would contravene a direction given by a judge, or that there is some other special reason why the person should not search any particular document.⁴⁹

ACCESS TO CRIMINAL RECORDS – CONCLUSIONS

- 1.42 There are a number of deficiencies in the state of the law in relation to accessing criminal records. There are no comprehensive search rules, with the criminal records search rules being applied by analogy in many cases, and uncertainty as to which proceedings they actually apply to. Even experienced judges occasionally overlook the existence of the rules, dealing with requests on other bases.

⁴⁸ Ministry of Justice, above n 6, para 4.1.3.

⁴⁹ Children, Young Persons, and Their Families Rules 1989, r 9(2).

Most requests for access are subject to discretions for which there is no guidance set out in the rules themselves.

- 1.43 The criminal records search rules are more than 30 years old. Having been drafted before the Official Information Act 1982 and the Privacy Act 1993, they are out of step with the movement towards increased availability of information, and it has been left to the courts to accommodate the principles underlying these Acts in applications under the rules.

RECORDS IN CIVIL CASES

Overview

- 1.44 The High Court and District Courts have specific rules governing access to court records in civil proceedings, which are similar in their terms. The High Court Rules also apply in the Court of Appeal.⁵⁰ There are no specific rules for the Supreme Court. The Māori Land Court and Family Court have their own rules. There are no specific search rules for the Environment Court or the Employment Court.

High Court Rules

Access by parties

- 1.45 Generally, parties and their solicitors have the right to search, inspect and take a copy of the file relating to a proceeding or interlocutory application, without paying a fee.⁵¹ Some restrictions still apply. Leave will be required if it is more than six years since the matter was determined,⁵² or if access is restricted by judicial direction, rule 66(7A),⁵³ or by any other statute.⁵⁴

Access by the public

- 1.46 Where a case has been determined, members of the public have an automatic right to search, copy and inspect documents (subject to any direction of a judge),⁵⁵ while if the proceeding has not been determined, there is no such automatic right. However, the registrar has a wide discretion to grant access, and must do so if the applicant establishes that he or she has a “genuine or proper interest”. Cases where inspection has been permitted have typically involved members of the news media seeking access to court documents in cases with a high public interest.⁵⁶

50 High Court Rules, r 66, District Courts Rules 1992, r 69. The High Court Rules also apply in the Court of Appeal – HR 66(14).

51 High Court Rules, r 66(2).

52 High Court Rules, r 66(8).

53 High Court Rules, r 66(7A) restricts access to documents relating to applications under rule 446U (subpoenas for service in Australia) or 502C (leave to service a subpoena on a witness in Australia), without leave of a judge.

54 High Court Rules, r 66 (15).

55 For the purposes of the search rules, “document” includes the record of oral evidence given at the hearing, other than any notes made personally by the judges; all exhibits produced in evidence; and the record of reasons for the judgment, other than any notes made personally by the judge – High Court Rules, r 66(13). The definition of “document” in the context of the rules in general is contained in rule 3.

56 For example *Currie v YMCA of Hamilton Inc* (1989) 2 PRNZ 343; *Re Fourth Estate Periodicals Ltd* (1989) 3 PRNZ 189; *Titchener v Attorney-General* (1990) 3 PRNZ 60; *Pratt Contractors Ltd v Palmerston North CC* (1992) 5 PRNZ 556.

- 1.47 Any person is entitled to search, inspect and take a copy of any document or record filed or lodged in the court more than 60 years before.⁵⁷ In the case of records less than 60 years old, subject to specific exceptions set out in the High Court Rules, any person may search, inspect and copy the following documents:⁵⁸
- (a) all registers and indexes of court records;
 - (b) any document to which a right of search or inspection is given by any Act;
 - (c) any document which constitutes notice of its contents to the public;
 - (d) documents that relate to applications for grants of administration, whether or not the proceedings have been determined;
 - (e) documents on a file relating to a proceeding that has been determined (for up to six years and subject to exceptions);
 - (f) any document on a file relating to an interlocutory application where the application relates to a proceeding that has been determined or it relates to an intended proceeding where leave to bring the proceeding has been refused.
- 1.48 There are specific exceptions to these general rights of access by the public. No one can search, inspect or copy the file or documents in proceedings under the following Acts (or any former provisions corresponding to them) without the leave of the registrar:⁵⁹
- Family Proceedings Act 1980;
 - Matrimonial Property Act 1963;⁶⁰
 - Property (Relationships) Act 1976;
 - Status of Children Act 1969;
 - Adoption Act 1955;
 - Protection of Personal and Property Rights Act 1988;
 - Family Protection Act 1955;
 - Mental Health (Compulsory Assessment and Treatment) Act 1992;
 - Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003;
 - Alcoholism and Drug Addiction Act 1966;
 - Married Women's Property Act 1952;⁶¹
 - Marriage Act 1955;
 - Civil Union Act 2004;
 - Guardianship Act 1968.⁶²
- 1.49 The High Court Rules provide that no document may be searched, inspected or copied if it relates to proceedings or interlocutory applications involving defamation, seduction, enticement or breach of promise.⁶³

57 High Court Rules, r 66(12). The reality is that most such documents will be held at Archives New Zealand, and the Public Records Act 2005 will apply.

58 High Court Rules, r 66.

59 High Court Rules, r 66(5). All these provisions relate to personal matters, as Professor John Burrows notes in *Media Law in New Zealand* (5 ed, Oxford University Press, Auckland, 2005) 357. These restrictions do not apply to parties and their solicitors: r 66(2).

60 This Act was repealed by the Property (Relationships) Act 1976.

61 This Act was consolidated by section 57 of the Matrimonial Property Act 1976.

62 The Guardianship Act 1968 still appears in r 69 of the District Courts Rules and r 66 of the High Court Rules, despite having been repealed by the Care of Children Act 2004, s 152.

63 High Court Rules r 66(6). These restrictions do not apply to parties and their solicitors: rule 66(2). The last three causes of action have been abolished by statute: Domestic Actions Act 1975.

- 1.50 No person has the right to search, inspect or copy a file or a document on a file in a proceeding or interlocutory application *after six years* from the date of a sealed judgment or order (or if there is no sealed judgment or order, after six years from the date of the judge’s reasons or minute making the order).⁶⁴

Registrar’s discretion and genuine or proper interest

- 1.51 Where a proceeding has not been determined, or access to records is restricted under rules 66(5), (6) or (8), a person may still apply to the registrar for leave to inspect a document.⁶⁵ The registrar has a wide discretion to allow access. The authors of *McGechan on Procedure* note that the registrar would normally grant media access to pleadings, and that it is not appropriate for registrars to take a restrictive approach.⁶⁶ The High Court has indicated that it is implicit in rule 66(9) that a registrar should liaise with a judge where the registrar has concerns about unrestricted searching, copying or publication, noting that it would be unfortunate if registrars felt obliged to take a conservative attitude to granting leave because there was no judge immediately available.⁶⁷
- 1.52 If a person can establish a genuine or proper interest, rule 66(9) provides that, subject to any direction of a judge, the registrar is obliged to grant access.⁶⁸ If a registrar refuses access to documents, the person seeking access may apply to a judge to review that decision.⁶⁹
- 1.53 In *Re Fourth Estate Periodicals Ltd*,⁷⁰ the High Court held that “genuine interest” means a real, true and solidly based interest, whereas “proper interest” involves an interest that is lawful, respectable and worthy. “The genuine or proper interest necessary under the rule should be greater than that of just any honestly motivated citizen or news reporter.”⁷¹
- 1.54 In *Currie v YMCA Hamilton*, the Court considered that at least where the only restriction was that contained in rule 66(3), an applicant with a genuine and proper interest has a prima facie entitlement to search the record, and good reason must be shown for this to be restricted.⁷²
- 1.55 The High Court took a more restrictive approach in *Titchener v Attorney-General [Search of records]*,⁷³ where the registrar declined an application by the *New Zealand Herald* to inspect certain affidavits. The High Court accepted that

64 High Court Rules r 66(8).

65 High Court Rules, r 66(9).

66 RA McGechan (ed) *McGechan on Procedure* (Loose-leaf, Brookers, Wellington, 1988) HR66.03.

67 *Pratt Contractors Ltd v Palmerston North City Council* (1992) 5 PRNZ 556.

68 High Court Rules, r 66(9). This discretion does not apply to documents that a judge has ordered not to be open to the public.

69 High Court Rules, r 66(11).

70 *Re Fourth Estate Periodicals Ltd* (1989) 3 PRNZ 189.

71 *Re Fourth Estate Periodicals Ltd*, above n 70, 194, Williamson J. The words were sufficiently wide to cover this situation, where a reporter from a specialist business publication was inquiring about matters affecting the receivership of a company.

72 *Currie v YMCA Hamilton* (1989) 2 PRNZ 343, 346. The Court took the same approach in *Attorney-General v Palmer* [2004] NZAR 112.

73 *Titchener v Attorney-General [Search of records]*(1990) 3 PRNZ 60.

the paper could claim to have a genuine and proper interest in the proceeding, but was not satisfied that that alone was sufficient reason to allow access to the affidavits.

- 1.56 The difference between the approaches may lie, in part, in the documents that the media wanted to inspect – in *Currie* it was a report of a provisional liquidator, as opposed to affidavit evidence.⁷⁴ The High Court has described one of the policies reflected in rule 66 as being the preservation of a climate of opinion in which justice is best achieved.⁷⁵ Courts will often be more reluctant to allow evidence to be searched and published than pleadings, because there is less of a risk of trial by the media and prejudgement of issues with pleadings than with affidavits and exhibits.
- 1.57 In *Elworthy-Jones v Counties Trustee Co Ltd [Inspection of Records]*,⁷⁶ the High Court found that the applicant had a genuine and proper interest in reporting issues of public interest, but that was restricted to issues arising within the business community. The proceeding contained a mixture of business and personal issues. The normal course was to prevent publication of matters relating to personal disputes: given that, and that the proceeding had not yet been determined, it was not appropriate to permit general inspection of the file. A further application could be made once the pleadings had closed, and the issues were “more closely defined”.
- 1.58 The discretion exercised by the registrar under the High Court Rules is a judicial one, and the Court will not intervene with the exercise of such a discretion except on clear grounds.⁷⁷

Proceedings under the Human Rights Act 1993 or the Citizenship Act 1977

- 1.59 A special rule, rule 68 of the High Court Rules, applies in respect of records relating to proceedings arising out of a section 90 Human Rights Act 1993 reference, applications to the Court under section 19 Citizenship Act 1977 and to other miscellaneous appeals under certain enactments.⁷⁸ Subject to court order, rule 68 allows any person to search documents in relation to a pending proceeding, and any former proceedings connected with it. In respect of completed proceedings, the parties, and any person who can show that they have an “interest” in, or are affected by, the proceedings, can search the record after first giving the registrar 24 hours notice that they are seeking access.

74 *Titchener* has been described as a borderline decision, somewhat out of line with other decisions – McGechan, above n 66, HR66.06(c).

75 *Pratt Contractors Ltd v Palmerston North City Council* (1992) 5 PRNZ 556, 559.

76 *Elworthy-Jones v Counties Trustee Co Ltd [Inspection of Records]* (2002)16 PRNZ 392.

77 *Young v Ross* (30 July 1999) HC HAM CP 4/97 and CP 154/92, para 13, Hammond J.

78 This does not apply to appeals under the Judicature Act 1908, District Courts Act 1947, Summary Proceedings Act 1957 or any appeal in proceedings under the Acts listed in rule 66(5) (restricted proceedings).

District Courts Rules

- 1.60 The rules governing access to court records in civil cases in the District Court are similar to the High Court Rules.⁷⁹ As well as excluding access to records in defamation proceedings, the District Courts Rules provide that no document may be searched, inspected or copied that relates to any cause or matter involving property disputes arising out of agreements to marry.⁸⁰
- 1.61 No one may search, inspect or copy a document or file relating to proceedings under certain Acts specified in the rules,⁸¹ but this does not apply to parties and their solicitors, unless the judge directs otherwise.⁸² As in the High Court, a registrar may grant leave to search a file that would otherwise be restricted under rules 69(4), (5) or (7), and must do so if a person has a genuine or proper interest.⁸³
- 1.62 The District Courts Rules have been described as being based on the presumption that open access to a file before trial may inhibit access to justice by placing pressure on litigants, or may create unfairness by permitting publication of groundless claims that have yet to be scrutinised by a judge, and that may be modified, struck out before trial, or ruled inadmissible.⁸⁴

Disputes Tribunals

- 1.63 Each Disputes Tribunal forms part of the District Court in which it is located. Disputes Tribunals can hear certain disputed claims where the amount is less than \$7,500 or, by consent, \$12,000.⁸⁵ Hearings before Disputes Tribunals are held in private, although the Tribunal can allow other people to be present if they have a genuine and proper interest in the proceeding, or in the proceedings of Disputes Tribunals generally.⁸⁶ The decisions of Disputes Tribunals are not reported.
- 1.64 In 2004, the Law Commission recommended that the proceedings of Disputes Tribunals should be conducted in public, with discretion for the referee to restrict access or reporting only when the public interest requires it.⁸⁷ It also recommended that those proceedings should be recorded.

79 District Courts Rules 1992, r 69. The District Courts Rules can now be drafted by the Rules Committee: Judicature Act 1908, s 51B(1). But they remain conventional subordinate legislation and their empowering provision is in the District Courts Act 1947, s 122. The power to create any civil rules of procedure must be exercised by the Governor-General with the concurrence of the Chief Justice and any two or more members of the Rules Committee: Judicature Act 1908, s 51D.

80 District Courts Rules 1992, r 69(5).

81 District Courts Rules 1992, r 69(4). The Acts are the: Adoption Act 1955; Marriage Act 1955; Civil Union Act 2004; Alcoholism and Drug Addiction Act 1966; Mental Health Act 1969; Mental Health (Compulsory Assessment and Treatment) Act 1992; Guardianship Act 1968; Care of Children Act 2004; Domestic Actions Act 1975; Property (Relationships) Act 1976; Family Proceedings Act 1980; Child Support Act 1991; Domestic Violence Act 1995; Harassment Act 1997.

82 District Courts Rules 1992, r 69(2).

83 District Courts Rules 1992, r 69(8).

84 *Brown v Attorney General* (2004) 17 PRNZ 257, 264.

85 Disputes Tribunals Act 1988, ss 10–13.

86 Disputes Tribunals Act 1988, s 39.

87 New Zealand Law Commission *Delivering Justice for All* (NZLC R85, Wellington, 2004) 322.

The Government agreed with these recommendations, but as yet there have been no changes made.⁸⁸

- 1.65 Rule 35 of the Disputes Tribunals Rules 1989 provides that documents and files held by the Tribunal may be accessed by any party to the proceedings, or their representative, and any other person who can satisfy the registrar that they have a genuine and proper interest in the proceedings.⁸⁹ Any person who is dissatisfied with the registrar's decision may appeal to a District Court judge.

Māori Land Court

- 1.66 The rules relating to records in the Māori Land Court are contained in Part 19 of the Māori Land Court Rules 1994. All documents that form part of the permanent record of the Court are available for copying and inspection.⁹⁰ In the case of the Minute Books, copies are to be kept and made available for copying and inspection.⁹¹
- 1.67 Issues have arisen around who should be entitled to access the historical record of the Māori Land Court, in particular, the information held in the Minute Books. This matter is discussed in chapter 9 (Archive Practices).

Environment Court

- 1.68 There are no rules that specifically deal with the issue of access to court records in the Environment Court, and discussions with registry staff in Wellington indicate that there are no formal guidelines in relation to access to records. The general policy is that only the parties can have access to files. Members of the public or press can take notes at hearings, which are held in public, but if they want copies of documents, they will be referred to the parties. This is said to be because of the confidential nature of some of the evidence (which may include matters such as financial details of a company).⁹²

Employment Court

- 1.69 The Employment Court was established as a separate specialist court under the Employment Relations Act 2000. Neither the Employment Relations Act 2000 nor the Employment Court regulations provide any guidance as to how applications to access court records should be dealt with.

88 Government Response to Law Commission Report on *Delivering Justice for All*, paras 254–255. The Government directed that officials report back by December 2005 on the operational implications of opening the Disputes Tribunals.

89 The Disputes Tribunal file will usually include a claim form, letters to and from the parties, directions by the registrar and the referee, and the order of the Tribunal. It may also include an investigator's report, requests for interpreters or phone conferences, documentation such as insurance documents, applications for rehearing or appeal, and any decision on appeal. Most offices also keep a basic case progression sheet – correspondence with Principal Disputes Referee, Peter Spiller, dated 20 March 2006.

90 The permanent record of the Māori Land Court includes the Minute Book (in which is bound the handwritten or typewritten record of the proceedings of the Court), application files, original orders, and other instruments or documents required to be deposited with the Court, and any other record that is required under the Act: Māori Land Court Rules, r 165.

91 Māori Land Court Rules, rule 167.

92 Meeting with Environment Court registry staff, 21 October 2004.

1.70 In *Ranchhod v Auckland Healthcare Services*,⁹³ the Employment Court described a practice by registry staff of refusing access to files by non-parties on the basis that there was no provision specifically authorising access, and that courts were exempted from the application of the principles of the Official Information Act 1982 and Privacy Act 1993.

1.71 Judge Colgan considered the practice in the light of section 14 of the New Zealand Bill of Rights Act 1990 and relied, by analogy, on rule 66 of the High Court Rules. He noted that the Court would be significantly out of step with the practice of other courts, for no apparent reason, if it operated with a de facto policy of refusing any request from a non-party to knowledge of any aspects of a case from the Court's files.⁹⁴ Because there are no express rules for registrars to consult, he suggested it might be preferable, in cases where one or more parties opposed access, for application to be made to a judge.

Family Court

1.72 Searches of records in the Family Court are now regulated by the Family Courts Rules 2002.⁹⁵ The rules are subject to any court orders restricting access, and any statutory provision relating to searching court records.⁹⁶

1.73 Under rule 427, parties to proceedings, their lawyers, and any person who satisfies the registrar that they have a proper interest in the proceedings, may search the court records, without payment of a fee. The rule also allows access to court records to certain people in relation to proceedings under the Children, Young Persons, and Their Families Act 1989.⁹⁷

1.74 The Family Court at Wellington advised that, in practice, where non-parties make a request for access, the registrar tends to seek a direction from a judge, particularly if the request comes from the media.

1.75 A person may not search a record if an applicant for a protection order has advised the Court that the applicant wishes his or her residential address to be kept confidential under rule 311, and the document discloses the applicant's address.⁹⁸ The registrar may also refuse to allow a person to search where to do so would contravene a judicial direction, or where there is some special reason why a person should not search a document.

1.76 After six years has passed from the date of a sealed judgment, or from the date of the judge's reasons or minute making an order, no person has a right to search

93 *Ranchhod v Auckland Healthcare Services* [2001] ERNZ 383.

94 Above n 93, para 12.

95 Family Courts Rules 2002, rr 427–431. The new rules impliedly repeal rule 69 of the District Courts Rules insofar as it applied to records of files of the Family Court, and rule 9 of the Children, Young Persons, and Their Families Act 1989 – *L v Family Court at Dunedin* (9 April 2003) HC DUN CP2/03, para 5, Hansen J.

96 Family Courts Rules 2002, r 427(6).

97 Rule 427(3) allows access to lawyers representing children in Children, Young Persons, and Their Families Act matters, lay advocates supporting children in CYPF matters, Care and Protection Coordinators, Youth Justice Coordinators, counsel to assist, and officers of the Office of the Commissioner for Children.

98 Family Courts Rules 2002, r 428.

a file or a document on a file in any proceedings.⁹⁹ The registrar may grant leave for such a search, and must do so if a person demonstrates that they have a genuine or proper interest. Applications for leave may be made to the registrar informally.¹⁰⁰

- 1.77 After 60 years has expired, upon payment of a fee, a person may search, inspect and copy any document or record.¹⁰¹
- 1.78 In *A v The Registrar*, a woman applied to the registrar for leave to inspect documents on file relating to her mother's divorce from her first husband,¹⁰² to help establish whether the first husband was her father. Access to divorce proceedings was restricted in accordance with rule 66(5)(m) of the High Court Rules and the registrar denied the application. The applicant appealed.
- 1.79 The judge accepted that A had a genuine and proper interest, and noted that, since rule 66 was introduced,¹⁰³ our concept of privacy had become more fully developed. The courts could not ignore the enactment of the Privacy Act 1993 and the Official Information Act 1982, or the acceptance of the tort of privacy, when considering applications to search court records.¹⁰⁴ The information sought was personal information about the applicant, and should have been made available unless there had been a good reason for withholding it.

Specific legislative restrictions upon searching

- 1.80 Some family law statutes contain further restrictions on accessing court records. One example is the Adoption Act 1955, which limits who can access court records.¹⁰⁵
- 1.81 Apart from these exceptions, adoption records are not open to inspection without an order of the Family Court, District Court or High Court for the purposes of prosecuting someone for making a false statement; in the event of any question as to the validity and effect of an interim or final adoption order; or on any other special grounds. This provision has historically been interpreted in an extremely restrictive manner, the threshold being set so high that few applicants can ever meet it.
- 1.82 There is also a limited exception in the Adult Adoption Information Act 1985, allowing a social worker access to the court file in certain circumstances where a doctor requires access to information for the purposes of medical treatment or genetic counselling.¹⁰⁶

99 Family Courts Rules 2002, r 429(1)(a) and (b).

100 Family Courts Rules 2002, r 429(2) and (3).

101 Family Courts Rules 2002, r 431.

102 *A v The Registrar* [2000] NZFLR 936.

103 Rule 66 was introduced into the Code of Civil Procedure in 1973.

104 *A v Registrar (Whangerei Registry of the High Court)* above n 102, para 11.

105 Adoption Act 1955, s 23. The only people who have an automatic right to access adoption records are:

- those who must inspect the record for the purposes of administering an estate or trust;
- a registrar, or marriage or civil union celebrant, who is wanting to investigate forbidden degrees of relationship under the Marriage Act 1955, or Civil Union Act 2004;
- a social worker preparing a report under s 23A(1) of the Adoption Act.

106 Adult Adoption Information Act 1985, s 11(4)(b).

Coroner's Court

- 1.83 Section 31 of the Coroners Act 1988 provides that all certificates of findings of coroners, depositions admitted at the inquest and other recommendations and comments of the coroner are sent to the Secretary of Justice, which means they are held by the Ministry of Justice, not by the coroner.
- 1.84 Pursuant to section 44(1) of the Act, any person may obtain a copy of any certificate or notice given to the Secretary under the Act and, under section 44(2), may inspect and, upon payment of a prescribed fee, obtain a copy of any document given to the Secretary relating to an inquest, or a death in respect of which the coroner decided not to hold an inquest, during the previous 12 months. Section 44(3) then provides that, subject to section 44(2), the availability of documents given to the Secretary must be determined in accordance with the Privacy Act 1993 or the Official Information Act 1982.¹⁰⁷
- 1.85 These sections are interpreted by the Ministry of Justice as requiring the Ministry to make any document given to the Secretary available to any person requesting it in the first 12 months after an inquest. But, after the first 12 months, the Official Information Act 1982 or the Privacy Act 1993 applies. Any remaining files held by the coroner are considered to come into the category of judicial officer's notes and are not accessible.

CIVIL SEARCH RULES – CONCLUSIONS

- 1.86 The civil search rules are not comprehensive across the civil jurisdictions. Specialist courts sometimes apply the High Court and District Courts Rules by analogy, or operate without access rules.
- 1.87 While open justice has become an increasingly important theme in the cases, temporal considerations operate when discretions are being exercised in civil record searches. For example, the rules limit public access to court records where proceedings have not been determined, in the interests of ensuring that trials proceed without prejudice, and that unfair or unbalanced reporting does not occur.
- 1.88 The six-year period in which access is allowed without leave to civil records has no equivalent in the criminal records search rules.

OTHER LEGISLATION IMPINGING ON COURT RECORDS

- 1.89 A number of statutes provide broad rights to certain agencies to search and copy documents for investigation and enforcement purposes. Examples include the Inland Revenue Department,¹⁰⁸ Serious Fraud Office,¹⁰⁹ Ministry of Fisheries¹¹⁰ and Security Intelligence Service.¹¹¹

¹⁰⁷ See now the Coroners Bill 2005, cls 26–27.

¹⁰⁸ The Inland Revenue Department has the right to search any file without reference to other parties and without payment of a fee – Tax Administration Act 1994, s 17.

¹⁰⁹ The Serious Fraud Office has the power to require the production of documents for inspection under section 9 of the Serious Fraud Office Act 1990, if the Director believes them to be relevant to an investigation.

¹¹⁰ In the course of the enforcement and administration of this Act, a fishery officer may, at any reasonable time, examine any record or document – Fisheries Act 1996, s 199(1)(a).

¹¹¹ New Zealand Security Intelligence Service Act 1969. Section 4A of the Act provides for the issue of interception warrants (including authorising the seizure of documents) in certain conditions.

ACCESS TO COURT RECORDS IN OVERSEAS JURISDICTIONS

- 1.90 In the course of preparing this report we have examined the provisions governing access to court records in a number of overseas jurisdictions. Detailed discussion of access rules overseas will be limited in this chapter to Australia and United Kingdom, which provide useful parallels, and still serve to illustrate the diversity of approach that can be taken to access. In other parts of the report, we refer to experiences in the United States and Canada, particularly in relation to electronic records, where developments are well ahead of New Zealand.
- 1.91 At this point, we simply note that in the United States, Federal Court case files are presumed to be available for public inspection and copying,¹¹² unless sealed or otherwise subject to restricted access by statute, federal rule, or Judicial Conference Privacy Policy. The tradition of public access to Federal Court case files is also rooted in constitutional principles.¹¹³ However, public access rights are not absolute, and courts will balance access and privacy interests in making decisions about the public disclosure of case files. In *Nixon v Warner Communications Inc*,¹¹⁴ the Supreme Court noted that every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.
- 1.92 In Canada there is a strong common law presumption that court proceedings should be open to the public, and that the public should have access to court records. However, the open court presumption is rebuttable, and courts maintain discretion over the issue of access to their records.¹¹⁵

AUSTRALIA AND THE UNITED KINGDOM

Australia

- 1.93 In Australia, the principles governing access to court records vary widely. In some jurisdictions, access is given as of right to the entire file, while other courts' rules restrict access to specific documents, or grant access to a file only by leave of the court.
- 1.94 The Australian Law Reform Commission has recommended that the Standing Committee of Attorneys-General order a review of federal, state and territory legislation and court and tribunal rules in relation to non-party access to evidence and other documents produced in relation to proceedings, with a view to developing and promulgating a clear and consistent national policy.¹¹⁶
- 1.95 The following is a brief summary of the rules across a number of Australian jurisdictions.

¹¹² *Nixon v. Warner Communications Inc.* (1978) 435 US 589 where the Supreme Court held that there is a common law right “to inspect and copy public records and documents, including judicial records and documents”.

¹¹³ Judicial Conference Privacy Policy, adopted September 2001, *Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files*, citing *Richmond Newspaper Inc. v. Virginia* (1980) 448 US 555, 575-78.

¹¹⁴ *Nixon v Warner Communications*, above n 112, 596.

¹¹⁵ *Attorney General of Nova Scotia v MacIntyre* [1982] 1 SCR 175.

¹¹⁶ Australian Law Reform Commission *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (Report 98, Commonwealth of Australia, Sydney, 2004, recommendation 7-1.

High Court of Australia

- 1.96 In the High Court of Australia, any person is entitled to take a copy of any documents filed in an office of the Registry, except for affidavits (other than an affidavit that serves as an originating process) and annexures and exhibits to affidavits, before they have been admitted in court.¹¹⁷

Federal Court of Australia

- 1.97 A person may search and inspect documents specified in the Federal Court Rules, unless the Court or a judge has ordered that the document is confidential.¹¹⁸ Specified documents include applications, pleadings, judgments and orders, submissions, notices of appeal and reasons for judgment. Leave is required for inspection by a non-party of a number of other documents,¹¹⁹ but leave will normally be granted where the relevant part, or all, of a document has been admitted into evidence, or read out in open court.¹²⁰

Family Court of Australia

- 1.98 The Family Court Rules limit the right to search court records to the Attorney-General, a party to the marriage or the particular proceedings in respect of which the search is sought. A search by any other party requires the leave of the Court, and must demonstrate a “proper interest”.¹²¹

New South Wales

- 1.99 Access to material in any proceedings in the Supreme Court of New South Wales is restricted to the parties, except with leave of the Court.¹²² There are some documents that the parties need leave of the Court to search (for example, expert reports or witness statements), but generally a party has a right of search and inspection of most documents. Similar rules apply in the District Court.¹²³
- 1.100 The Court will normally exercise its discretion to grant access to non-parties to pleadings and judgments in concluded proceedings (subject to any confidentiality orders); to documents that record what was said or done in open court; to material that was admitted into evidence; or information that would have been heard or seen by any person present in open court (again, subject to confidentiality orders). Access to other material will not be allowed unless a registrar or judge is satisfied that exceptional circumstances exist. The registrar or judge may notify interested parties when an application for access by a non-party is received.¹²⁴

117 High Court Rules 1952 (Cth), r 58.8.

118 Federal Court Rules 1979 (Cth), o 46, r 6.

119 This includes most affidavits, unsworn statements of evidence, interrogatories and answers, lists of documents given on discovery, admissions, evidence taken on deposition, subpoenas and documents lodged in answer to a subpoena, and any judgment, order or other document which the Court has ordered be confidential.

120 Federal Court guidelines www.fedcourt.gov.au (last accessed 16 February 2006).

121 Family Law Rules 1984, o 5, r 6.

122 Supreme Court Practice Note SC Gen 2, dated 17 August 2005.

123 District Court Rules 1973 (NSW), Part 52, r 3; Practice Note Number 62, Access to Court Files by Non-Parties, 23 April 2002.

124 Supreme Court Practice Note SC Gen 2, above n 122.

1.101 There is a special rule for media wanting access to records of criminal proceedings. Subject to court order, or any overriding Act or law, on application to the registrar, a media representative is entitled to inspect certain documents at any time from when the proceedings commence until the end of two working days after they are finally completed, for the purpose of compiling a fair report of the proceedings for publication.¹²⁵ The documents that the media is entitled to inspect under this section are copies of the indictment, court attendance notice or other documents commencing the proceeding, witnesses' statements tendered as evidence, briefs of evidence, police fact sheet (in case of a guilty plea), transcripts of evidence and any record of a conviction or an order.

Victoria

1.102 In the Victorian Supreme Court, most documents filed in court in civil proceedings are available for public inspection. Any person may inspect and obtain copies of any document filed in a proceeding, on payment of a fee, other than a document that the Court has ordered should remain confidential, or that in the opinion of the Prothonotary (principal registrar) should remain confidential to the parties.¹²⁶ The same rule applies in civil proceedings in the County Court.¹²⁷

1.103 The position is quite different in criminal proceedings in Victoria. The Supreme Court (Criminal Procedure) Rules 1998 provide that a document filed in a proceeding to which the rules relate is not open for inspection unless the Court or the relevant officer of the Court so directs.¹²⁸

Queensland

1.104 In Queensland, there is a general right to access to court documents in both civil and criminal proceedings, subject to certain limitations, including any court order restricting access to the file or document, or the Court requiring the file or document for its own use. In civil cases, the registrar must comply with a request by any person to search for, and permit inspection of, a document on a court file.¹²⁹ A fee applies for applications by non-parties.

125 Criminal Procedure Act 1986 (NSW), s 314. In this context, criminal proceedings means proceedings relating to the trial or sentencing of a person for an offence, whether or not a sexual assault offence (other than a committal or bail proceeding); or proceedings relating to an order under Part 15A (Apprehended Violence) of the Crimes Act 1900 – s 295.

126 Supreme Court (General Civil Procedure Rules) 2005 (Vic) r 28.05. On the Supreme Court website, the Prothonotary comments that files that are confidential and not to be searched include criminal proceeding files, divorce files, files involving application under section 596 of the Corporations Act, and others determined to be confidential by the Court or at the discretion of the Prothonotary. Certain documents on files are also not available for search, including outlines of submissions/evidence/arguments; witness statements and expert reports; synopses of evidence; exhibits to affidavits; subpoenaed documents; submissions and chronologies, and documents ordered to be confidential by the Court. www.supremecourt.vic.gov.au Practice and Procedure – Prothonotary's Office – File Searches (last accessed 2 November 2005).

127 County Court Rules of Procedure in Civil Proceedings 1999 (Vic), o 28.05.

128 Supreme Court (Criminal Procedure) Rules 1998 (Vic), r 1.11(4). A proceeding to which the rules relates includes all proceedings under the Crimes Act 1958 (Vic), or any other matter within the criminal jurisdiction of the Supreme Court.

129 Uniform Civil Procedure Rules 1999 (Qld), s 981.

1.105 In criminal proceedings, on payment of a fee, a person may search for or inspect a court file or document, other than an exhibit or indictment, and obtain a certified copy of details noted on an indictment (other than details about the jury), unless there is a court order restricting access to the file, or a court officer considers giving the details may put a person's safety at risk.¹³⁰ Parties are not required to pay a fee.

1.106 There is a separate rule for exhibits produced at trial. These may be inspected on payment of a fee, unless a court officer considers it may risk the exhibit's security or a person's safety, or the judge orders that the exhibit not be inspected, or be sealed and not opened without a further court order.¹³¹

South Australia

1.107 In South Australia, the approach is to provide a list in the rules of all material that members of the public may inspect or copy.

1.108 In the Supreme Court, District Court and Magistrates' Courts, certain material is available to any member of the public for inspection or copying as of right, namely:

- any process relating to proceedings and forming part of the Court's records;
- a transcript of evidence;
- any documentary material admitted into evidence in any proceedings;
- a transcript of submissions by counsel;
- a transcript of the judge's summing up or directions to the jury in a trial by jury;
- a transcript of reasons for judgment (including sentencing remarks);
- a judgment or order of the Court.¹³²

1.109 Certain other material may be inspected or copied only with the permission of the Court, and subject to conditions that may be imposed by the Court, including a condition limiting the publication or use of:¹³³

- material that was not taken or received in open court;
- material suppressed from publication;
- material placed before the Court during sentencing;
- documentary material filed in connection with a preliminary examination;
- photographs, slides, film, video audio or other form of recording from which a visual image or sound can be produced;
- material of a class prescribed by regulations.

¹³⁰ Criminal Practice Rules 1999 (Qld), s 57.

¹³¹ Criminal Practice Rules 1999 (Qld), s 56.

¹³² Supreme Court Act 1935 (SA), s 131(1), District Court Act 1991 (SA), s 54(1), Magistrates Court Act 1991 (SA), s 51(1).

¹³³ Supreme Court Act 1935 (SA), s 131(2) and (3), District Court Act 1991 (SA), s 54 (2) and (3), Magistrates Court Act 1991, s 51(2) and (3).

Australian Capital Territories (ACT)

- 1.110 In the Supreme Court of the ACT there is a general right for parties to search, inspect or copy documents filed in the registry.¹³⁴
- 1.111 People who are not parties to the proceeding require leave of the Court for access to any of a number of listed documents, one of the common threads being where the document has not been admitted in evidence or read out in open court.¹³⁵

United Kingdom*Civil proceedings*

- 1.112 In the United Kingdom, civil proceedings are commenced by issuing and serving a claim form. Any person, on payment of a fee, can search, inspect or copy a claim form that has been served, and any judgment or order given in public, unless the court orders otherwise.¹³⁶ However, the claim form will often only have a statement of the order that the claimant is seeking from the court. More detail is set out in the “particulars of claim”, for which there is no automatic right to inspect.¹³⁷
- 1.113 The Civil Procedure Rules also allow a member of the public to inspect, during the trial, witness statements that stand in place of evidence in chief, unless the court has decided otherwise.¹³⁸ If they want to inspect other documents on the file, they must seek the court’s permission.¹³⁹
- 1.114 A party to proceedings may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party or communication between the court and a party to another person.¹⁴⁰

134 Supreme Court Rules 1937 (ACT), o 66, r 11. There are some restrictions: if the document is a subpoena served on someone else and issued by another party, the consent of that other party will be required; and leave of the Court will be required if the document was filed to support an application for a document, evidence or thing to be kept confidential, or to be granted privilege from production.

135 A judgment, order, transcript of a proceeding, or any other document, that the court has ordered to be kept confidential; an affidavit or written submission that has not been read in court; part of an affidavit ruled to be inadmissible in evidence; an interrogatory, answer to an interrogatory, admission that has not been admitted into evidence; a list of documents given on discovery; a subpoena, or a document filed with the registrar in answer to a subpoena to produce; a document in relation to a proceeding about the adoption, custody or guardianship of a child, or a proceeding under the Family Law Act 1975 (Cth); a document filed in the probate jurisdiction (other than a grant of probate or letters of administration, an order to administer an estate; or a proceeding about a contested matter); a deposition taken before an examiner; a document filed in support of an application made in the absence of a party; an unsworn statement of evidence; or a document that the registrar decides should be confidential to the parties to the matter in the interests of justice.

136 Civil Procedure Rules 1998, r 5.4 (4).

137 G Robertson and A Nicol *Robertson and Nicol on Media Law* (4 ed, Sweet & Maxwell, London, 2002) 472. Sometimes this more detailed statement is endorsed on the claim form itself. In such cases, the right of inspection extends to it.

138 Civil Procedure Rules, r 32.13(1).

139 Civil Procedure Rules, r 5.4(5) Robertson and Nicol (above n 137) suggest that the court is likely to require particularly compelling reasons before granting leave – above n 137, 473.

140 Civil Procedure Rules, r 5.4(4).

- 1.115 The rules have been discussed in a number of recent cases. In general, the judges stress the principle of open justice as a starting principle, and state the strong presumption that cases should be heard in public and decisions given in public.¹⁴¹ In *Dian AO v Frankel & Mead*,¹⁴² the court referred to the time at which a request is made, noting that the principle of open justice is primarily concerned with monitoring the decision-making process *as it takes place*, not with reviewing the process long after the event. The court cited as an example Civil Procedure Rules rule 32.13 (which provides that a witness statement standing as evidence in chief at the trial is open to inspection only during the course of the trial).
- 1.116 In family proceedings, non-parties require leave of the court to inspect any document on the court file other than a document given in open court.¹⁴³ In cases involving children, no document shall be disclosed to other than a limited category of people named in the rules, without the leave of a judge.¹⁴⁴
- 1.117 Official shorthand writers take a note of the proceedings of the High Court, Court of Appeal, Crown Court or County Court. The rules allow the sale of transcripts to people who are not parties to the action.¹⁴⁵
- 1.118 In insolvency cases, a record of steps taken and orders made in bankruptcy and winding up proceedings is open to the public for inspection, but the Registrar of the Companies Court may refuse access to it if he or she is not satisfied as to the propriety of the purpose for which inspection is required.¹⁴⁶

Criminal proceedings

- 1.119 In the Magistrates' Court, justices' clerks are encouraged to meet reasonable requests of the media for copies of court lists and the register of decisions.¹⁴⁷
- 1.120 Members of the public are not entitled by law to inspect the Crown Court records.¹⁴⁸ However, subject to the provisions of the Rehabilitation of Offenders Act 1974, there is no objection in principle to a member of the public being given the basic facts relating to a particular case, that is, the counts on which a

141 See for example, *Re Guardian Newspapers Ltd* [2005] 3 All ER 155, 161; *Gio Personal Investment Services v Liverpool and London Steamship and Indemnity Association* [1999] 1 WLR 984; *Barings Plc v Coopers and Lybrand* [2000] 1 WLR 2353.

142 *Dian AO v Frankel & Mead* [2004] EWHC 2662, para 30.

143 Family Proceedings Rules, r 10.20. However, for 14 days after the pronouncement of a decree nisi on a divorce, the public has the right to inspect the evidence filed by the petitioner – Family Proceedings Rules, r 10.20(3), 2.36(4) and 2.24(3).

144 Family Proceedings Rules, r 4.23(1).

145 Civil Procedure Rules, Pt 39, Practice Direction, paras 1.11 and 6.3. In family proceedings, non-parties require the leave of the court to get a transcript – Family Proceedings Rules, r 10.15(6). Transcripts can be expensive however – in an article for the *Press Gazette*, dated 16 April 2004, a reporter noted that two days' transcripts of a drugs trial used for a Channel 4 film cost £3000: A Gatton "On the Conviction Trail" *Press Gazette*, UK, 16 April 2004.

146 Robertson and Nicol, above n 137, 475, Insolvency Rules 1986, S.I. 1986 No.1925, rr 7.27 and 7.28.

147 Home Office Circular 80/1989. As a minimum, the court lists contain the defendant's name, age, address and profession, and the alleged offence.

148 Crown Court Manual, S 30, *Requests for Information*, April 2005.

defendant was arraigned, the plea, the verdict and the sentence.¹⁴⁹ Staff are advised that they should not normally release any information regarding an acquitted defendant when more than six months has passed since the date of disposal.¹⁵⁰

149 Crown Court Manual, above n 148, para 1.2. The Manual also notes that any information contained in police antecedents, pre-sentence reports or medical reports must not be given to members of the public, and that information should not be given to members of the public if it can only be done at a disproportionate cost of official time.

150 Crown Court Manual, above n 148, para 4.1.

Chapter 2

Principles

- 2.1 In this chapter we identify those principles that should underpin rules concerning access to information held by a court. We discuss their relationship to the principles in the Official Information Act 1982, the Privacy Act 1993 and the Public Records Act 2005. The principles are:
- open justice;
 - freedom of expression;
 - the right to a fair trial;
 - the proper administration of justice;
 - freedom of information;
 - privacy of personal information;
 - the public interest;
 - preservation and availability of historical information;
 - judicial independence.

OPEN JUSTICE

- 2.2 Open justice is a fundamental tenet of New Zealand’s justice system. It requires, as a general rule, that the courts must conduct their business publicly unless this would result in injustice.¹⁵¹ Open justice is an important safeguard against judicial bias, unfairness and incompetence, ensuring that judges are accountable in the performance of their judicial duties.¹⁵² It maintains public confidence in the impartial administration of justice by ensuring that judicial hearings are subject to public scrutiny, and that: “Justice should not only be done, but should manifestly and undoubtedly be seen to be done”.¹⁵³
- 2.3 There is an argument, espoused by both the Chief Justice and the District Court judges in submissions on the consultation draft of this report, that the open justice principle is satisfied by open court hearings and judgments being accessible as of right. This argument contends that open justice (and consequently the accountability of the judicial process) is largely not engaged when it is a question of access to court records.

151 The principle originated in Anglo-Saxon England: *Gannet Co v Depasqule* (1979) 443 US 368, 420. The principle of open courts is adopted in many jurisdictions and has been affirmed in the International Convention on Civil and Political Rights, art 14(1).

152 *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 449-450 per Lord Diplock; *Elworthy-Jones v Counties Trustee Co Ltd* [2002] NZAR 855, 860; (2002) 16 PRNZ 392. See also Hon JJ Spigelman “Seen to be done: the Principle of Open Justice” (2000) 74 ALJ 290 (Part I); 378 (Part II).

153 *R v Sussex JJ Ex p McCarthy* [1924] 1 KB 256, 259 per Lord Hewart.

- 2.4 However, in our view, the transparency of the judicial process extends to public access to the records of court cases. To be effective, open justice requires presumptively open access to court records, at least from the start of a hearing. Access to records at the time of the hearing should ensure accuracy of reporting by the media. At a later period, the possibility of a miscarriage of justice may come to light years after a case has been decided and records may need to be perused at that stage. At a later stage too, a person or organisation may need to research historic cases to investigate issues of public interest and concern.
- 2.5 The leading modern authority concerning open justice, and one that related to the distribution of a record of the court proceedings, is *Scott v Scott*,¹⁵⁴ where the House of Lords held that, in general, the administration of justice must be conducted in open court. Lord Shaw quoted Bentham:¹⁵⁵

Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.

- 2.6 The judgments recognise that there could be exceptions to the principle of open justice, giving examples of cases involving trade secrets, wards of the court or “lunatics”, where the judge was exercising a paternal or administrative jurisdiction, or where it might be that justice could not be done at all if it had to be done in public. Viscount Haldane described the underlying principle as follows:¹⁵⁶

While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done.

- 2.7 The Lords agreed that it was generally for Parliament and not the courts to determine the exceptions to the open justice principle.
- 2.8 Almost 70 years later, the House of Lords in *Attorney-General v Leveller Magazine Ltd* again confirmed the importance of open justice,¹⁵⁷ noting two aspects to the principle:
- In the court itself, the principle of open justice requires that proceedings should be held in open court, to which the public and press are admitted, and in criminal cases all evidence communicated to the court is communicated publicly.
 - Nothing should be done to discourage publication to a wider audience of fair and accurate reports of proceedings that have taken place.

154 *Scott v Scott* [1913] AC 417 (HL).

155 *Scott v Scott*, above n 154, per Lord Shaw, 477.

156 *Scott v Scott*, above n 154, per Viscount Haldane LC, 437.

157 *Attorney-General v Leveller Magazine* [1979] AC 440, 450, per Lord Diplock.

2.9 Lord Diplock cited two reasons for the open justice rule:¹⁵⁸

- it provides a safeguard against judicial arbitrariness or idiosyncrasy;
- it maintains public confidence in the administration of justice.

2.10 In recent decisions, the UK courts have considered that the principle of open justice applied to access to court records. For example, in *Dian AO v Davis Frankel & Mead*,¹⁵⁹ in allowing access to records in proceedings that concluded some years ago to a person with a legitimate interest, the High Court said:

... I think that in the case of documents that were read by the court as part of the decision-making process, the court ought generally to lean in favour of allowing access in accordance with the principle of open justice ...

Open justice rationale in New Zealand jurisprudence

2.11 In *Broadcasting Corporation of New Zealand v Attorney-General*,¹⁶⁰ the President of the Court of Appeal stated:¹⁶¹

... 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.

2.12 The Court of Appeal also accepted that if an open hearing would prevent the due administration of justice, then on rare occasions, the exceptional step of closing the Court could be taken. But any departure from that principle must depend not on judicial discretion, but on the demands of justice itself.

2.13 In the most recent decision on access to court records, *Mafart and Prieur v Television New Zealand Ltd*, the Supreme Court has said that:¹⁶²

¹⁵⁸ *Attorney-General v Leveller Magazine*, above 157, 450 per Lord Diplock. Lord Diplock noted that because the purpose of the general rule in support of open justice is to serve the ends of justice, it may be necessary to depart from it if the nature of the proceeding is such that applying the open justice 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.

¹⁵⁹ *Dian AO v Davis Frankel & Mead* [2005] 1 WLR 2951, para 56; [2005] 1 All ER 1074. See also *Chan U Seek v Alvis Vehicles Ltd* [2005] 1 WLR 2965; [2004] EWHC 3092 (Ch).

¹⁶⁰ *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120. The principles of open justice have been recognised and applied by the New Zealand courts in a number of other decisions, including *Police v O'Connor* [1992] 1 NZLR 87; *Television New Zealand Ltd v R* [1996] 3 NZLR 393, 396–397; *Surrey v Speedy* (1999) 13 PRNZ 397; *Elworthy-Jones v Counties Trustee Co Ltd* [2002] NZAR 855, 860; *Muir v CIR* (2004) 17 PRNZ 365 (CA); and *Television New Zealand Ltd v Mafart & Prieur* [2005] DCR 640.

¹⁶¹ *Broadcasting Corporation of New Zealand v Attorney-General*, above n 160, 122, per Woodhouse P.

¹⁶² *Mafart and Prieur v Television New Zealand Ltd* (11 May 2006) [2006] NZSC 33, para 7.

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.

- 2.14 In *R v Mahanga*,¹⁶³ the Court of Appeal accepted that when a court is exercising its supervisory powers over court files and deciding whether access should be permitted, “the principle of open justice will often be important, especially when applications are made for access to Court records by the media”. In *R v Wharewaka*,¹⁶⁴ the High Court held that a presumption of openness of court records will apply where there is no countervailing public interest.

Open justice in criminal cases

- 2.15 The right to a public hearing has been considered sufficiently important to be affirmed in international and national human rights documents. Article 14(1) International Covenant on Civil and Political Rights (ICCPR),¹⁶⁵ provides:

*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*¹⁶⁶

- 2.16 This right to a fair and public hearing by an independent and impartial court is affirmed for everyone charged with an offence under section 25 of the New Zealand Bill of Rights Act 1990.
- 2.17 Open justice is particularly important in criminal trials because a person’s liberty is at stake and the principle serves in part to protect an accused. It is also widely regarded as improving the quality of court testimony, disinclining witnesses to tell other than the truth. It makes the judicial system more transparent and comprehensible to the public. This can reassure those associated with both accused and victims that the trial has been conducted fairly and the accused treated justly.¹⁶⁷

163 *R v Mahanga* [2001] 1 NZLR 641, 651, para 32 (CA). The Court did note that open justice was at its apex during a trial.

164 *R v Wharewaka* (8 April 2005) HC AK, CRI-2004-092-4373, Baragwanath J.

165 The ICCPR was ratified by New Zealand in 1978.

166 General comments made by the United Nations Human Rights Committee under Article 14 (CCPR General Comment No 13 twenty first session; 13/04/84 para 3, para 6) emphasise that the article extends beyond the criminal law to civil litigation, and that publicity at hearings is an important safeguard in the interest of the individual and society at large. Apart from the exceptional circumstances for which the article allows exceptions, “a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons”.

167 *R v Mahanga*, above n 163, para 18 (CA).

- 2.18 We endorse the principle of open justice as a guiding principle and recommend a presumption of openness of access to court records.

The boundaries of open justice: protection of the vulnerable

- 2.19 However, there will be good reasons not to allow access in some cases. As was envisaged in *Scott v Scott*, Parliament has, from time to time, set limits on open justice, by enacting specific closed-court provisions relating to certain types of proceeding, or by granting discretionary power to the courts to limit open courts if they think it necessary. Statutes providing for closed, or partially closed, courts and restricted reporting, where the current rules limit access to records of proceedings in those courts, are set out in the previous chapter.¹⁶⁸ Many of these statutes relate to Family Court proceedings. Presently, the Family Court is mainly a closed court. However, there are moves to bring greater openness.¹⁶⁹

Argument for closed Family Court proceedings and limited access to records

- 2.20 In a case under the former Guardianship Act 1968, *Wellington Newspapers v X*,¹⁷⁰ Judge Inglis QC noted that the purpose of the policy of hearing family law cases in private, and restricting publication of them, was to provide a system for the settlement of litigation of family issues in which those concerned may retain confidence that their sensitive, private and personal affairs will not be open for public curiosity or discussion.

- 2.21 In *A v R*,¹⁷¹ Judge MacCormick gave similar reasons for prohibiting publication of Family Court proceedings:

Many family matters involve highly personal or embarrassing facts and parties have a high privacy interest that is presumed to outweigh any public interest in openness.

Children are particularly vulnerable and the [effect of] publicity can be particularly harmful to them.

Parties and witnesses to family matters or matters involving children can be reluctant to give evidence in public.

Family matters are better conducted in a less formal setting.

168 Rule 66(5) of the High Court Rules (as enacted in the second schedule of the Judicature Act 1908) provides that no file and no document upon any file shall be searched, inspected or copied that relates to proceedings under certain listed statutes, although leave can be given to a person having a “genuine or proper interest” to search (r 66(9)). There is a similar list in District Courts Rules 1992, r 69(4). Note that the Family Courts Rules 2002, r 427, provide that records cannot be searched unless by a person with a proper interest.

169 Compare the Guardianship Act 1968 (proceedings closed to the public and no reporting, and no search of record unless the person had “proper interest”, now repealed) with the Care of Children Act 2004 (noted below).

170 *Wellington Newspapers v X* (2002) 21 FRNZ 727, following *Television New Zealand Ltd v W* (2000) 20 FRNZ 42.

171 *A v R* [2003] NZFLR 1105, 1108, citing Law Commission, *Seeking Solutions* (NZLC PP52, Wellington, 2002) 152.

Argument for greater openness in the Family Court

- 2.22 The Principal Family Court Judge, Peter Boshier, has argued recently for greater openness in the Family Court.¹⁷² His Honour has said:

There is every reason why the Family Court should be more open than it is at present. Any judicial process that is undertaken in a way in which it cannot be easily scrutinised is bound to attract criticism. The real relevance of this to the Family Court is that public confidence must be maintained and enhanced . . . where there are allegations of bias and delay, they are best met not by riposte, but by access to the decision making process.

- 2.23 However, set against the need for the Family Court process to be understood and scrutinised is the need to protect vulnerable children and, often, vulnerable adults.¹⁷³
- 2.24 We briefly review below the statutes specified in rule 66(5) of the High Court Rules and rule 69(8) of the District Courts Rules 1992 (except those that are now repealed) and conclude that there is good reason for access to records in proceedings under those statutes to continue to be restricted.

Review of Family Court statutes listed in search of court records rules

- 2.25 Proceedings under the Family Proceedings Act 1980 are closed to the public and reports may not be published except with leave of the court that heard the proceedings.¹⁷⁴ Similar provisions are to be found in the Child Support Act 1991 and the Domestic Violence Act 1995.¹⁷⁵ The rationale for closed courts is not specified in any of the Family Court legislation but there seems little doubt that the purpose is to protect vulnerable litigants and others, most especially children, from the damaging effects of the publicity of their sensitive and personal information, as suggested in the cases noted above. The same purpose applies to accessing records of such cases.
- 2.26 A similar rationale applies to the Adoption Act 1955, which provides for adoption proceedings to be held privately and forbids any publication of proceedings. Sections 23 and 23A provide for limited inspection of adoption records. Adoption records in individual cases have long been considered to be particularly private and of no concern to the public.
- 2.27 The Property (Relationships) Act 1976 on the other hand provides for proceedings to be heard in private at the option of either party (section 35).

172 See for example P Boshier “The Family Court and the Future” (2004) BFLJ, 265.

173 During the passage of the Care of Children Act 2004, some MPs argued strenuously for opening up Family Court proceedings to the media: see, for example, Dr Nick Smith: “If we have a secret court that is closed, where is the check on those people who make absolutely critical decisions about people’s families?” NZPD Care of Children Bill 4 November 2004, 16679.

174 See the Family Proceedings Act 1980, ss 159(1) and 169(1). Compare the Child Support Act 1991, ss 123 and 124, and the Domestic Violence Act 1995, s, 83 (allows support persons to be present) and s 125.

175 The purpose of the Domestic Violence Act is to reduce and prevent domestic violence and provide effective legal protection from domestic violence. The court has a power to exclude any person from the court, in the best interests of the children, and has exercised this power to exclude a father where there was evidence that the mother was a battered woman, and that the children suffered from the violence. See *E v S* (1996) 15 FRNZ 550, Judge von Dadelszen.

This provision suggests that records may be more open in such cases. Reporting of proceedings is still restricted.¹⁷⁶

- 2.28 The Family Protection Act 1955 and Status of Children Act 1969 have no provisions for closure or non-reporting. They do, however, deal with sensitive family matters, and children in particular. The Marriage Act 1955 and the Civil Union Act 2004 are listed, but provisions for searches of the register are now in the Births, Deaths, and Marriages Registration Act 1995, Part IX.
- 2.29 The Care of Children Act 2004 (replacing the Guardianship Act 1968) has begun the “opening up” of the Family Court. Section 137 provides for classes of persons who may attend; one is “accredited news media reporters” who have a right to attend but must leave if the judge requires them to do so. However, the interests of the child are paramount.¹⁷⁷ Section 137(6) says that nothing in the section limits any other power of the court to hear proceedings in private.
- 2.30 Section 139 opens up a right to publish reports of proceedings under the Act by “a person” so long as reports do not include names or particulars likely to lead to identification of the people centrally involved (unless with leave of the judge) or, with leave of court, in a professional publication. The judge can also grant leave to publish submissions of counsel.
- 2.31 One question raised by Professor John Burrows is whether the Family Court (as the District Court) has inherent power to suppress part of the evidence if, for example, it is particularly intimate, disturbing or unbalanced.¹⁷⁸ We consider there should be specific statutory power to enable suppression of evidence in those cases.
- 2.32 The provisions of the Care of Children Act 2004 point to another route to more openness, but there will still be good reasons for non-reporting in many cases, because children are involved and avoiding identification can be difficult, especially in local newspapers. In our view, this is also a good reason for limited access to information relating to those cases, as in other Family Court cases.
- 2.33 Section 39 of the Harassment Act 1997 gives the court statutory power to clear the court and restrict publication of proceedings (addressing for this particular Act Professor Burrows’ concern, as discussed above). The court thus may forbid publication of any report or account of the whole or part of the evidence or

176 The Property (Relationships) Act 1976, s 35A provides that no person shall publish any report of proceedings except with leave of the court that heard the proceedings, or for publication in professional journals and for genuine research (so long as parties are anonymised).

177 But the Court may well consider freedom of expression (the right to receive and impart information) as affirmed in the New Zealand Bill of Rights Act 1990, s 14, in exercising a discretion to require a person to leave the courtroom. In *Newspapers Publishers Association of New Zealand v Family Court* [1999] 2 NZLR 344, the Court noted that in *Re W (a minor)* [1992] 1 All ER 794, the UK Court of Appeal said that the freedom of the press as the eyes and ears of the public must be balanced against the protection of the child and a distinction must be drawn between matters of public curiosity and genuine public interest – the purpose behind the publication must govern any restraint on publication. The High Court noted that, although the paramountcy principle was the first consideration, freedom of expression also needed to be taken into account to the extent possible compatible with the welfare of the child.

178 J Burrows “Openness of Proceedings in the Family Court” [2005] NZLJ 101. The concern has been partly allayed by the strong indications of the Court of Appeal in *Brown v Attorney-General* (26 September 2005) Court of Appeal CA 196/04 that the District Court has inherent power to make suppression orders.

submissions, the name of any person or particulars likely to lead to the identification of that person, or the affairs of any person. The court may also exclude all or any persons other than the parties to the proceedings from the court.

Mental health and disability type proceedings listed in the search rules

- 2.34 The purpose of the Mental Health (Compulsory Assessment and Treatment) Act 1992 is, in part, to provide for the rights of compulsorily committed persons and to provide better protection for those rights (see the long title). The purpose of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 is to provide for the care and rehabilitation of the disabled.¹⁷⁹ The Protection of Personal and Property Rights Act 1988 provides for the protection and promotion of the personal and property rights of persons who are not fully able to manage their own affairs. Proceedings are private with no reporting permitted.
- 2.35 The long title of the Alcoholism and Drug Addiction Act 1966 says its purpose is to replace the previous legislation (the Reformatory Institutions Act 1909), and to make better provision for the care and treatment of alcoholics and drug addicts. It provides for committal to institutions for such people. Section 35 states that proceedings shall be heard and determined in private.
- 2.36 These Acts all concern the care, or (possibly compulsory) treatment of people who are sick or disabled, who are therefore particularly vulnerable. Evidence (especially of personal information) adduced at hearings about their future is thus very sensitive and should not be in the public domain, at least insofar as it is personal information relating to them.

Conclusion regarding protection for family and mental health type proceedings

- 2.37 There seem to be good reasons for non-disclosure to the public of sensitive, personal information in family law and mental health and disability cases. In both instances, the need to protect personal information from painful and humiliating disclosure may found an exception to the open justice principle. The rationale for protecting such information, especially relating to vulnerable people like children, battered spouses, the mentally disabled, or the elderly and infirm, where there seems no obvious public-interest reason in publicity, still holds.
- 2.38 We agree with the Law Commission's earlier report that hearings relating to such cases could become more open,¹⁸⁰ particularly if all parties are happy with this (as in the Property (Relationships) Act 1976), and limited reporting be permitted (especially with non-identification of persons involved in the proceedings) in the interests of allowing public scrutiny of the procedure and decision-making

179 In the Mental Health (Compulsory Assessment and Treatment) Act 1992, s 24 says that proceedings are not open to the public. Section 25 restricts reporting. In the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, proceedings are closed to public, s 129. Section 130 restricts reporting.

180 The Law Commission in *Delivering Justice for All* (NZLC R85, Wellington, 2004) recommended that family proceedings currently closed to the general public should remain so, but that the Court should have a discretion to permit wider attendance, including for accredited media representatives, and that restrictions on reporting should be confined to cases involving children or domestic violence unless the Court orders otherwise (and with no identifying details unless the Court grants leave).

processes. Where there now is such openness (as in the Care of Children Act 2004), records may need to be more open than at present to ensure accuracy of reporting. If other proceedings become more open in the future, the rules relating to access to court records in those proceedings should also change accordingly.

Protection of children and young people in Youth Court proceedings

- 2.39 Accredited media representatives may be present in Youth Court proceedings, but may only report with the permission of the judge.¹⁸¹ In practice, Youth Court judges invariably give consent to media reporting as long as the report does not identify the young person or their parents or school or victims of offences.
- 2.40 Section 38 of the Children, Young Persons, and Their Families Act 1989 prohibits publication of any report of proceedings of family group conferences. The rationale for all such restrictions would again be protection of the vulnerable, in this case children and young people.

Other statutory boundaries to open justice

- 2.41 Open justice could in some instances deter people from bringing their case before the court or from giving evidence. In Earl Loreburn's view in *Scott v Scott*:¹⁸²

... if the Court is satisfied that to insist upon publicity would in the circumstances reasonably deter a party from seeking redress, or interfere with the effective trial of the cause, in my opinion an order for hearing or partial hearing in camera may lawfully be made. But I cannot think that it may be made as a matter of course, though my own view is that the power ought to be liberally exercised, because justice will be frustrated or declined if the Court is a place of moral torture.

- 2.42 Some statutes give the court general authority in certain cases to clear the court and to forbid reporting. An example is section 138(2) of the Criminal Justice Act 1985. This discretion can be exercised when the court is of the opinion this is in the interests of justice, public morality or of the security or defence of New Zealand, or is necessary to protect the reputation of a victim of extortion or sexual offending.¹⁸³ However, the defendant, counsel, news media, police and informant are entitled to remain, and the verdict, decision or sentence must be given in public.¹⁸⁴

FREEDOM OF EXPRESSION

- 2.43 Section 14 of the New Zealand Bill of Rights Act 1990 affirms the common law right to freedom of expression, including the freedom to seek, receive and impart

181 Children, Young Persons, and Their Families Act 1989, ss 329 and 438.

182 *Scott v Scott*, above n 154, 446. See *Broadcasting Corporation of New Zealand v Attorney-General*, above n 160, 131–132.

183 Note that the Criminal Justice Act 1985, s 138(1) requires judges and others who deal with victims to treat them with courtesy, compassion and respect for their personal dignity and privacy.

184 However, 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.

information and opinions, of any kind, in any form.¹⁸⁵ In *R v Mahanga*,¹⁸⁶ the Court of Appeal indicated that freedom of expression was closely linked to the principle of freedom of information under the Official Information Act 1982.

- 2.44 Recent New Zealand decisions have increasingly relied on the right of freedom of expression as a justification for the open justice principle.¹⁸⁷ In a democracy, freedom of expression is a central political right. It is important that public information is made available and can be freely discussed. As the European Court of Human Rights expressed it in *Handyside v United Kingdom*, in a case relating to access to public records:¹⁸⁸

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it 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 offend, shock 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".

- 2.45 The news media have an important role in the process of disseminating information to the public to provide essential public scrutiny¹⁸⁹ and for this purpose they need access to records to ensure accurate reporting. But there are some necessary limitations to freedom of expression, in the sense of both imparting and receiving information. One of these may sometimes be the right to a fair trial and another, the integrity of the proper administration of justice.

THE RIGHT TO A FAIR TRIAL AND THE PROPER ADMINISTRATION OF JUSTICE

- 2.46 The element of publicity (and the related accountability) is a main ingredient of a fair hearing, in both criminal and civil trials. Research into assessments by citizens of their encounters with legal authorities has found seven underlying dimensions to procedural fairness: representation, quality of decision, the honesty, ethicality and motivation of the authorities, lack of bias of authorities and opportunities for correction.¹⁹⁰ These are all aspects of the due and proper administration of justice and in general are supportive of open justice at trial and continuing openness of records.
- 2.47 However, the main aim of the courts must be to ensure that justice is done, and openness should not be paramount if it would hinder the proper administration

185 The right is also confirmed in the Universal Declaration of Human Rights (UDR) and the International Covenant on Civil and Political Rights (ICCPR), ratified by New Zealand in 1978. See G Huscroft and P Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) chapter 5.

186 *R v Mahanga*, above n 163.

187 See *R v Liddell* [1995] 1 NZLR 538, 546 (CA); *Television New Zealand Ltd v R* [1996] 3 NZLR 393, 395–397 (CA); *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, 558 (CA); *R v Mahanga*; above n 163; *R v Burns (Travis)* [2002] 1 NZLR 387, 403–405 (CA).

188 *Handyside v United Kingdom* (1976) 1 EHRR 737, 754 (ECtHR) cited in *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (CA).

189 *Police v O'Connor* [1992] 1 NZLR 87, 94.

190 See Tom R Tyler "What is Procedural Justice: Criteria used by Citizens to Assess the Fairness of Legal Procedures" (1988) 22 *Law & Society* 103, 128.

of justice. The right of a fair trial according to law is a fundamental element of the justice system which can override open justice and freedom of expression.¹⁹¹ As already noted, the right to a fair and public hearing by an independent and impartial court is affirmed in criminal cases by section 25 of the New Zealand Bill of Rights Act 1990.

- 2.48 The concept of a fair trial has been said to defy analytical definition.¹⁹² As Lord Mustill has noted, standards of fairness are not immutable, and depend on the context of the decision.¹⁹³ However, we agree with the view of Professor Paciocco that the key aspects of a fair criminal trial are that it is a public hearing before an independent and neutral judge, in which the prosecution has the burden of establishing its allegations against the accused beyond reasonable doubt. The independence and impartiality of the trier is thus essential in a fair trial, and the presumption of innocence equally important.¹⁹⁴
- 2.49 With respect to the presumption of innocence, the risk of potential prejudice, particularly in pre-trial hearings, sometimes needs to be balanced against principles of open justice and freedom of information, in considering whether there should be access to documents, such as bail documentation, or written briefs of evidence handed up to the court in committal hearings.¹⁹⁵ There is a risk that potential jurors may be made aware of material raised at pre-trial hearings that is subsequently ruled inadmissible, and that they may be prejudiced by such material. Suppression of such material may sometimes be justified in the interests of a fair trial and the proper administration of justice.
- 2.50 The right to a fair trial is also important in civil cases.¹⁹⁶ In a civil trial, name suppression may occasionally be appropriate if the proper administration of justice requires it, for example, if the pre-trial publication of a defendant's name (or certain documents¹⁹⁷) may have irreversibly prejudicial consequences for a fair trial.¹⁹⁸
- 2.51 As Viscount Haldane noted in *Scott v Scott*,¹⁹⁹ the exceptions to open justice are the outcome of a yet more fundamental principle, that the chief object of courts

191 *R v Burns (Travis)* above n 187, 404-405 (CA) where Thomas J said that: "once it has been determined that there is a significant risk that the accused will not receive a fair trial, the issue ceases to be one of balancing. The principles of freedom of expression and open justice must then be departed from, not balanced against". See too *Gisborne Herald Co Ltd v Solicitor-General* [1989] 1 NZLR 1, 3 (CA). See also *Dietrich v R* (1992) 177 CLR 292, 299-300 per Mason CJ and McHugh J regarding the right of an accused to a fair trial. The New Zealand cases are cited in A Butler and P Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington 2005) 328.

192 *Jago v District Court of New South Wales* (1989) 168 CLR 23, 57 per Deane J, cited in Hon Justice Badgery-Parker "The Criminal Process in Transition: Balancing Principle and Pragmatism – Part I (1995) 4 JJA 171, 176.

193 Lord Mustill in *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92, 106.

194 D Paciocco "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991) 15 Crim LJ 315, cited in Hon Justice Badgery-Parker, above n 192.

195 See *R v Murray* (11 September 1995) HC HAM, T11/95, Hammond J.

196 See A Butler and P Butler, *The New Zealand Bill of Rights Act: A Commentary*, above n 191, 332.

197 *Greenpeace NZ v Minister of Fisheries* [1995] 2 NZLR 463 (HC). An injunction to stop publication of discussion papers as to the impact of fishing quotas on natural resources was declined however, as the Court held they were of a general kind.

198 See *Angus v H and Hutt Valley Health Corporation* (17 June 1999) HC WN CP 129/99, Wild J.

199 *Scott v Scott*, above n 154, per Viscount Haldane, 437.

of justice must be to ensure that justice is done. The administration of justice has been said to be a very broad term and its proper administration requires not only that trials be fair, but that persons who can assist in its administration be encouraged to participate.²⁰⁰ The power of courts to issue suppression orders incorporates not only the need to prevent prejudice to a fair trial, but also the need to restrict publicity where this would deter participation of key witnesses.

- 2.52 In our view, such suppression orders, and orders concerning inadmissibility of evidence are valid reasons for restricting openness in some cases, where there is likely to be prejudice to a fair trial and the proper administration of justice. But this would mainly be so before and at the time of the trial.

FREEDOM OF INFORMATION

- 2.53 The right to receive information (affirmed in section 14 of the New Zealand Bill of Rights Act 1990) does not necessarily entail the right to insist on access to information.²⁰¹ However, all “official information” held by the executive sector of government is subject to legislation based on a principle of availability of the information, unless there is good reason for withholding it: the Official Information Act 1982. Courts are excluded from the operation of the Official Information Act 1982.²⁰² We are asked to consider the relationship that should exist between an access regime for court information and the Official Information Act 1982.

Official Information Act 1982

- 2.54 The Official Information Act 1982 arose out of deliberations of the Committee on Official Information (the Danks Committee) and radically altered the presumptions in relation to the availability of information held by the public sector.²⁰³ Instead of official information being secret, it was to be made more freely available while at the same time protecting it to the extent consistent with the public interest and the preservation of personal privacy.
- 2.55 The Act defines “official information” as any information held by a department, a minister of the Crown in his or her official capacity, or an organisation named in Schedule 1 of the Act or Part 2 of Schedule 1 of the Ombudsmen Act 1975.²⁰⁴ It does not include any information that is held solely as an agent or for the

200 *Kalick v The King* (1920) 555 DLR 104, 112, cited in NSW Law Reform Commission *Contempt by Publication* (Discussion Paper 43, Sydney, 2000) 324.

201 A Butler and P Butler, *The New Zealand Bill of Rights Act: A Commentary*, above n 191, 320, citing *Leander v Sweden* (1987) 9 EHHR 433 (ECtHR). But the European Court’s position is that there is a right not to be impeded in efforts to access available information: *Autronic v Switzerland* (199) 12 EHHR 485, 504.

202 Section 2(6) of the Official Information Act 1982 specifically excludes courts, tribunals, Royal Commissions, and various types of commission of inquiry from the classification of departments and organisations which are subject to the Act (although tribunals, Royal Commissions and other commissions of inquiry are excluded only in relation to their judicial functions).

203 Committee on Official Information (Danks Committee) *Towards Open Government: General Report 1* (Wellington, 1980). The Official Secrets Act 1951 started from the premise that official information belongs to the Government, and should not be disclosed unless a person could show either sufficient reason or authorisation. The Danks Committee was set up by the Government to contribute to the aim of freedom of information by considering the extent to which official information can be made readily available to the public, and in particular to examine the purpose and application of the Official Secrets Act 1951: *Towards Open Government*, 5.

204 Other than the Parliamentary Service or mortality review committees – Official Information Act 1982, s 2(1).

sole purpose of safe custody, and which is so held on behalf of a person other than a department or a minister of the Crown in his or her official capacity or an organisation.²⁰⁵

Purposes and principle of availability

2.56 The purposes of the Official Information Act 1982 are set out in section 4 as follows:

- to increase progressively the availability of official information to the people of New Zealand in order to enable their more effective participation in the making and administration of laws and policies, and to promote the accountability of ministers of the Crown and officials, and thereby to enhance respect for the law and to promote the good government of New Zealand;
- to provide for proper access by each person to official information relating to that person;
- to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

2.57 The principle of availability of information underpins the Act. The presumption is that official information should be made available unless there is good reason for withholding it.²⁰⁶

Coverage

2.58 All government departments and a number of other public bodies such as Crown entities are subject to the provisions of the Official Information Act 1982.²⁰⁷ Separate but similar legislative provisions apply to information held by local government.²⁰⁸

2.59 Section 2(6)(a) of the Act provides that for the avoidance of doubt, “organisation” does not include a court. The issue of access to information held by courts and judicial bodies was outside the terms of reference of the Danks Committee.²⁰⁹ In its general report, the Committee noted:²¹⁰

For the purposes of our inquiry we have regarded “official information” as material held by Government departments and Government agencies. We have not extended our study to information generated and held by Parliament, the courts,

205 Official Information Act 1982, s 2(1).

206 Official Information Act 1982, s 5: “The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.”

207 Official Information Act 1982, s 2. Subject to a number of exceptions, “official information” is defined as any information held by a department, a minister of the Crown in his or her official capacity, or an organisation subject to the Official Information Act 1982. “Organisation” means an organisation named in Part 2 of Schedule 1 of the Ombudsmen Act 1975, other than Parliamentary Services or mortality review committees, or in Schedule 1 of the Official Information Act 1982. “Department” means a government department named in Part 1 of Schedule 1 of the Ombudsmen Act 1975, other than the Parliamentary Counsel Office.

208 The freedom of information principles underpinning the Official Information Act 1982 were extended to local authorities in 1987, with the enactment of the Local Government Official Information and Meetings Act 1987.

209 Committee on Official Information, above n 203, para 1.08; *R v Mahanga*, above n 163, para 33.

210 Committee on Official Information, above n 203, 8.

administrative tribunals and local government, but we would expect our proposals to affect in due course practices in those areas, and also in the private sector.

- 2.60 The Court of Appeal has held that the exclusion of courts does not mean that the principles of the Official Information Act 1982 are irrelevant to access to information held by courts, or that the whole of the Act's framework is inapplicable. The Court said the purposes of the Act and the principle of availability should influence the exercise of judicial discretion under the rules governing access to court records in marginal cases.²¹¹

Good reasons to withhold information

- 2.61 The Act identifies two types of “good reasons”, namely “conclusive” reasons and “other” reasons. The former always justify the withholding of information. The application of “other reasons” requires a balancing of interests before it can be decided whether there is justification for withholding.

Conclusive reasons

- 2.62 Good reason for withholding official information will exist where making the information available would be likely:²¹²
- (a) to prejudice the security or defence of New Zealand, or the international relations of the Government;
 - (b) to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by any other government or agency of such a government, or any international organisation;
 - (c) to prejudice the maintenance of the law, including the prevention, investigation and detection of offences, and the right to a fair trial;
 - (d) to endanger the safety of any person; and
 - (e) to damage seriously the New Zealand economy, in any one of a number of specified ways.

Other reasons

- 2.63 Section 9 of the Official Information Act 1982 sets out other reasons that may constitute good reason for withholding information, but that may be outweighed by public interest considerations favouring disclosure. In summary, subject to other considerations, good reason may exist to withhold official information:
- (a) to protect the privacy of natural persons (including deceased people);
 - (b) to protect trade secrets, or information likely to unreasonably prejudice the commercial position of a person supplying or the subject of the information;
 - (c) to protect information that is subject to an obligation of confidence, or that any person has been or could be compelled to provide by an enactment;
 - (d) to avoid prejudice to public health or safety;
 - (e) to avoid prejudice to New Zealand's substantial economic interests;

²¹¹ *R v Mahanga*, above n 163, para 34. The Court of Appeal noted that this would be of practical importance when the same information to which access is sought from court records is concurrently held by departments or organisations that are subject to the Official Information Act 1982.

²¹² Official Information Act 1982, s 6.

- (f) to avoid prejudice to measures that prevent or mitigate material loss to members of the public;
- (g) to maintain the constitutional conventions protecting communications by or with the Queen or her representative, collective and individual ministerial responsibility, the political neutrality of officials, and the confidentiality of advice tendered by ministers and officials;
- (h) to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to ministers, and protect ministers and public servants from improper pressure or harassment;
- (i) to maintain legal professional privilege;
- (j) to enable the person or agency holding the information to carry out commercial activities without prejudice or disadvantage;
- (k) to enable a minister or organisation to carry on negotiations without prejudice or disadvantage, including commercial or industrial negotiations;
- (l) to prevent the disclosure or use of official information for improper gain or advantage.

2.64 The High Court has held that the test in determining whether withholding the information is necessary to protect one of the specified interests is a test of “reasonable necessity” rather than strict necessity.²¹³

2.65 Official information may also be withheld if the information is or will soon be publicly available, the document does not exist or cannot be found, or the information cannot be made available without substantial collation or research.²¹⁴ A request for information may also be refused on the grounds that it would be contrary to the provisions of a specified enactment to make the information available, or that it would constitute a contempt of court.²¹⁵

Conclusion

2.66 The principle of availability under the Official Information Act 1982 can be seen as analogous to the principle of open justice operating in the courts. There are similarities between the good reasons for withholding information in the Official Information Act 1982 and reasons underlying refusals of access to court records, such as privacy and sensitivity of information. The approaches taken to requests for official information held by the executive branch of government and information held by the courts are not inconsistent.

2.67 We do not consider that the Official Information Act 1982 should be extended to information held by the courts because the nature of the information held

213 *Television New Zealand Ltd v Ombudsman* [1992] 1 NZLR 106, 118.

214 Official Information Act 1982 ss 18(d)-(f). Other grounds include: that the information is not held by the agency, and the person dealing with the request has no grounds for believing that the information is either held by another body or is connected more closely with the functions of another body; or that the request is frivolous or vexatious or that the information requested is trivial. Official Information Act 1982, ss 18 (g)–(h).

215 Official Information Act 1982 s 18(c)(i) and (ii). For a discussion of how the Official Information Act 1982 works in practice see Steven Price “The Official Information Act 1982: A Window on Government or Curtains Drawn” (2005) VUW Occasional Paper No 17, who notes that the operation of the Act has been subject to some criticism. The paper is available by email from law-centres@vuw.ac.nz.

requires different considerations. However, the policy framework underlying the Act, of a presumption of availability subject to exceptions, can, in our view, be adapted to deal with information held by the courts, although it needs to be implemented by detailed rules.

PRIVACY

- 2.68 Privacy values increasingly influence many areas of the law in New Zealand and overseas. Privacy is a protean concept and many who have written about it have acknowledged the difficulties of definition.²¹⁶ However, it is generally agreed that it includes the protection of personal information. A right to privacy, including the protection of personal information, is endorsed by international human rights conventions ratified by New Zealand.²¹⁷ In recent years, both the New Zealand Parliament and judiciary have moved to protect personal privacy. This is in part a response to the rapid developments in new technologies that enable personal information to be collected, manipulated and disseminated in a wide variety of ways not previously possible.
- 2.69 The Official Information Act 1982 permits the withholding of information to protect the privacy of natural persons unless there are overriding public interest considerations.²¹⁸ A common law tort of invasion of privacy has now been recognised by the Court of Appeal.²¹⁹ The Privacy Act 1993 creates a regime governing the collection, retention, disclosure and use of personal information which applies to both public and private sector agencies.²²⁰

Privacy Act 1993

- 2.70 With the advent of large computer databanks, there has been increasing international concern about easier access to, and misuse of, personal information. The Council of the Organisation for Economic Co-operation and Development (OECD) issued recommended guidelines for nation states to adopt so as to promote and protect individual privacy. The Privacy Act 1993 is New Zealand's

216 An operational definition of the "right to privacy" might be a right to non-intrusion into the public sphere of personal information about an individual that would limit their autonomy and dignity. For discussions of the concept of privacy and difficulties of definition see, for example, Victorian Law Reform Commission *Defining Privacy* (Occasional Paper by Kate Foord, Melbourne 2002), Raymond Wacks *The Protection of Privacy* (Sweet & Maxwell, London, 1980), New Zealand Law Commission *Protecting Personal Information from Disclosure* (NZLC PP49, Wellington, 2002).

217 Article 17 of the International Covenant on Civil and Political Rights states:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

The Covenant was ratified by New Zealand on 10 December 1978. Countries ratifying have an obligation to ensure to all individuals within their territory, the rights recognised by the Covenant.

218 Official Information Act 1982, s 9(2)(a).

219 *Hosking v Runting* [2005] 1 NZLR 1.

220 The Broadcasting Act 1989 has empowered the Broadcasting Standards Authority to effectively strengthen protections to individual privacy when broadcasting. A broadcaster has been successfully prosecuted for breaching the personal privacy of a court witness: *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720; 1 HRNZ 558 (Eichelbaum CJ).

response to these recommendations.²²¹ The Act concerns the collection, holding and disclosure of personal information. Twelve privacy principles are set out in section 6 of the Act, with their qualifiers and exceptions. The principles mirror the OECD guidelines. The Act applies widely to “agencies”, which include any person, or body of persons, in the public and private sector, with certain exceptions. Courts are specifically excluded from the definition of “agency”, but only in relation to their judicial function.²²²

Exemption for courts acting in their “judicial function”

- 2.71 This exclusion is similar in comparable jurisdictions. The Victorian Law Reform Commission has discussed the purpose of the exclusion:²²³

This limitation on the protection of individual privacy reflects the view that the administration of open justice is in the public interest. It has nevertheless been recognised that there can be a tension between privacy interests and the administration of a fair and open justice system. For example, while courts are generally open to the public, the identification of parties in matrimonial and certain criminal proceedings is restricted.

- 2.72 In order to assess the application of the Privacy Act 1993 (New Zealand) to courts and tribunals it is necessary to know when they are acting in their “judicial function”, and when they act in any other residual function. The phrase “judicial function” is not defined in the Act.²²⁴ It has recently been discussed in *Ministry of Justice v S*,²²⁵ where the High Court concluded that those administrative tasks performed by a registrar in preparation for a judicial proceeding, or post adjudication, are part of the judicial function of the court, and thus the Privacy Act 1993 would not apply to such administrative actions.
- 2.73 Undoubtedly, the Privacy Act 1993 does not apply until a matter is finally determined and all appeal rights have been exhausted. However, after this time, it might be argued that the courts are no longer holding court records in relation to a judicial function. Courts become “keepers of the record”, and this is retained for historical, public interest and research purposes. Hence it is arguable that the Privacy Act 1993 applies to court records at this stage.
- 2.74 But in our view, there is a continuing judicial function in relation to case files, and issues concerning them can arise at any time. A miscarriage of justice may be investigated years after a case has been heard and decided. A person with a genuine and proper interest in a case may be unable to attend hearings (for example, being out of the country or perhaps not even born) yet should still

221 The long title says it is an Act to promote and protect individual privacy in general accordance with the Recommendation of the Council of the Organisation for Economic Co-operation and Development Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data.

222 Privacy Act 1993, s 2(b)(vii).

223 Victorian Law Reform Commission *Privacy Law: Options for Reform* (Information Paper) (VLRC, Melbourne, July 2001) 4.13.

224 The Freedom of Information Act 1989 (NSW), s 6, has a definition of “judicial functions” as: “in relation to a court or tribunal . . . such of the functions of the court or tribunal as relate to the hearing or determination of proceedings before it”.

225 *In the matter of an appeal from the Human Rights Review Tribunal pursuant to s 123 of the Human Rights Act 1993 between Ministry of Justice and S* (7 April 2006) HC WN CIV-2005-485-1138, Goddard J.

be able to access records after a case is determined, at a reasonable charge. Responsibility for a decision does not end once a case is closed. Case files should be open for scrutiny, in particular for errors, at any time. We therefore consider that the judicial function of the court continues beyond the determination of a case. Thus the Privacy Act 1993 does not apply to court records.

- 2.75 Court-related information that is held by the Ministry of Justice (as part of the executive government) is subject to the Privacy Act 1993. Schedule 5 of the Act allows limited access to certain Ministry of Justice information by listed agencies. The information includes details of hearings, court document processing, enforcement of fines, suspended sentences and non-performance of bail conditions.²²⁶

Discussion

- 2.76 Court records contain large amounts of personal information about identifiable persons. People are often brought unwillingly into the legal process and compelled to divulge intensely private or commercially sensitive information for a particular purpose in a particular case. However, the surrender of privacy in relation to sensitive, personal or commercial information is usually necessary for the administration of justice and accords with open justice principles.
- 2.77 There is an argument that the surrender of privacy is not for all time. Information once in the public arena can become private through the passage of time.²²⁷ Particularly where the information may be personally humiliating and damaging to a person's reputation, disclosure can affect rehabilitation and reform, current relationships and future employment. The Criminal Records (Clean Slate) Act 2004, preserving the public interest in the integrity of the rehabilitation process, also supports the view that information, once public, can be protected after a period of time. This concept of public facts becoming private over time needs careful thought, however, and would not always apply, for example, in cases of notorious crime or historical or public interest.
- 2.78 In our view, the optimal way to deal with the protection of personal information in court records is to allow such protection as a good reason for withholding information in some circumstances, involving, for example, sensitive, personal or commercial information. In such cases, the absence of protection might otherwise have a chilling effect on court users, and undermine the use of courts for dispute resolution. Disclosure may be possible with anonymisation of unique personal identifiers in some cases. However, where the record is held and made available electronically, further safeguards may be necessary.²²⁸

THE PUBLIC INTEREST

- 2.79 The phrase “the public interest” has been described as “a yardstick of indeterminate length”.²²⁹ The public interest covers matters of public concern

226 Those authorised to access the particular identified information within this list are: the Serious Fraud Office; Department for Corrections; Ministry of Justice (for research purposes only); Police; Legal Services Agency and Land Transport Safety Authority.

227 See too, *TV3 Network Services Ltd v Broadcasting Standards Authority*, above n 220, and the US cases of *Briscoe v Reader's Digest* 4 Cal 3d 529 and *Melvin v Reid* 297 P 91 (1931) on this same point.

228 See chapter 6, and see also Judges Technology Advisory Committee *Open Courts, Electronic Access to Court Records and Privacy*: Discussion Paper for the Canadian Judicial Council (May 2003) para 98.

229 *Attorney-General v Car Haulways (NZ) Ltd* [1974] 2 NZLR 331, 335 (CA).

rather than mere public curiosity, such as matters relating to public health, economy, and safety, the detection of crime, and national security generally.²³⁰

- 2.80 In *TV3 Network Services Ltd v Broadcasting Standards Authority*,²³¹ the High Court observed that there is a distinction between matters properly within the public interest, in the sense of being of legitimate concern to the public, and those that are merely interesting to the public on a human level.²³²
- 2.81 The Official Information Act 1982 contains a number of reasons that may constitute good reason for withholding information, but that may be outweighed by public interest considerations favouring disclosure.²³³ The Office of the Ombudsmen suggests that a useful starting point for considerations favouring release in the public interest is section 4(a), which provides that one of the purposes of the Official Information Act 1982 is to increase progressively the availability of official information, in order to encourage more effective public participation in law making, and to promote accountability of ministers and officials, “and thereby to enhance respect for the law and to promote the good government of New Zealand”.²³⁴ However, it also has a wider ambit.²³⁵
- 2.82 Views can differ in relation to individual assessments of the public interest. An example can be found in a comparison between dicta of Cooke J in *Mafart v Gilbert*,²³⁶ and of Simon France J in *Television New Zealand Ltd v Mafart and Prieur*,²³⁷ where access requests were made in relation to the same film excerpt. In 1986, Cooke J said:²³⁸

Manifestly there is a public interest in knowing the course and result of the New Zealand Court proceedings. That is different, however, from any interest in seeing a film including a videotaped part of the proceedings. Without in any way minimising the enterprise of the Corporation in seeking to include this sequence in a film to be shown at an international festival and no doubt on many another occasion, the brief extract from the tape which it is desired to include is not itself a matter of great public interest; it will add to the impact of the film, but not significantly to its informative substance.

230 J Burrows and U Cheer, *Media Law in New Zealand* (5 ed, Oxford University Press, 2005) 255, citing *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344 at 376, *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473.

231 *TV3 Network Services Ltd v Broadcasting Standards Authority*, above n 220. The Court upheld several findings of the BSA in relation to a reporter entering a private property and speaking to a witness in a recent court case about the fact she had admitted in court to having been sexually abused as a child.

232 *TV3 Network Services Ltd v Broadcasting Standards Authority*, above n 220, 733 line 46.

233 Official Information Act 1982, s 9.

234 Office of the Ombudsman, *Practice Guidelines of the Ombudsmen*, Wellington, 2002, Part B, ch 5, 2.

235 “The phrase “public interest” is not restricted in any way. Wider concepts, such as an individual’s right to fairness and natural justice in respect of the actions of public sector agencies, should also be considered when assessing whether the overall public interest favours disclosure of certain information. This may often reflect the purposes for which the information is initially generated or supplied, the use to which it has been put, and other uses to which it may also legitimately be put” – Office of the Ombudsmen, above n 234.

236 *Mafart v Gilbert* [1986] 1 NZLR434 (CA).

237 *Television New Zealand Ltd v Mafart and Prieur* (23 May 2005) HC AK, BC200560562, Simon France J; [2005] DCR 640 (HC).

238 *Mafart v Gilbert*, above n 236, 445.

2.83 Almost 20 years later, Simon France J said of the same extract:²³⁹

There can be no dispute that this was a truly significant event in New Zealand history. It focused global attention on New Zealand and it raised for the Government significant political and diplomatic issues.

I consider that a visual record of the plea by the respondents is a matter of public interest. Information these days tends to be conveyed in visual form via television or the internet. I consider that the visual record of the plea is a matter of public interest, even if the content of the plea is known. Being able to see something is qualitatively different to simply knowing it has happened.

RETENTION AND AVAILABILITY OF HISTORICAL RECORDS

2.84 The Public Records Act 2005 recognises the importance of retaining a historical record of significant events for the information of future generations. These records play a key role in creating and preserving the historical and cultural heritage of New Zealand and developing a sense of national identity. The Public Records Act 2005 authorises and requires the collection of such government-held information and governs its collection, preservation and accessibility.²⁴⁰ The Act applies to information held by courts.

2.85 Unlike the Archives Act 1957, which focused on preservation of records, the Public Records Act 2005 is also concerned with ensuring that full and accurate records of central and local government are created and maintained, as well as preserved.²⁴¹ A detailed discussion of the issues raised by the Public Records Act 2005 in relation to court records is set out in chapter 9.

JUDICIAL INDEPENDENCE

2.86 Judicial independence is “a core principle of the New Zealand constitution”²⁴² and an important part of the checks and balances consequent on the separation of powers. Insofar as the proper operation of the judiciary itself is concerned, the separation of powers means that the executive government should not exert any form of pressure on the judges to make decisions in a particular way.²⁴³ The United Nations’ basic principles on the Independence of the Judiciary place an obligation upon the state to ensure this:²⁴⁴

The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

Essential elements of judicial independence

2.87 The essential elements of judicial independence include the following:²⁴⁵

²³⁹ *Television New Zealand Ltd v Mafart and Prieur*, above n 237, paras 54–56.

²⁴⁰ Public Records Act 2005, s 3(f) Purposes: “through the systematic creation and preservation of public archives and local authority archives, to enhance the accessibility of records that are relevant to the historical and cultural heritage of New Zealand and to New Zealanders’ sense of their national identity”.

²⁴¹ Public Records Act 2005, s 3.

²⁴² G Palmer and M Palmer *Bridled Power, New Zealand’s Constitution and Government* (4 ed, Oxford University Press, South Melbourne, 2004) 296.

²⁴³ G Palmer and M Palmer, above n 242.

²⁴⁴ Adopted by General Assembly resolution on 13 December 1985.

²⁴⁵ GP Palmer “Judicial Selection and Accountability” chapter 1 in BD Gray and RB McClintock *Courts and Policy Checking the Balance* (1995 Legal Research Foundation, Brooker’s) 30.

- judges enjoy security of tenure and can only be removed for incapacity or misbehaviour; and
 - the salary of judges cannot be reduced while they are in office.
- 2.88 These elements constitute the traditional concept of judicial independence, based on what Sir Geoffrey Palmer has called the “English model”.²⁴⁶ With respect to security of tenure and salary, the Constitution Act 1986 (New Zealand) gives effect to these aspects of judicial independence by severely restricting the ability of the legislature or executive to remove a judge from office, and prohibiting reduction in the salary of a judge.
- 2.89 Recently, there has been considerable discussion about judicial independence in what Sir Anthony Mason has called “an extended sense” – “an independence that is something more than the freedom of a judicial officer to make a decision free from governmental threat or favour, an independence that extends to the institutional autonomy of the courts”.²⁴⁷
- 2.90 The Canadian Supreme Court has described three conditions essential to judicial independence: security of tenure, financial security, and institutional independence of judicial tribunals regarding matters affecting adjudication.²⁴⁸ In relation to this institutional independence, Le Dain J said:²⁴⁹
- Judicial control over the matters referred to by Howland CJO – assignment of judges, the sittings of the court, and court lists – as well as the related matters of allocation of courtrooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or ‘collective’ independence.*
- 2.91 However, the Supreme Court held that the direct administration of a court by a government department did not infringe judicial impartiality, and was not essential for purposes of judicial independence.

Rationale for judicial independence: the preservation of impartiality

- 2.92 Many commentators agree that the essence of, and the rationale for, the principle of judicial independence is the attainment of impartiality (or at least perceived impartiality) in the conduct of the business of the judicial branch.²⁵⁰ Judicial independence has been described as the sum of arrangements that exist from

246 See S Shetreet *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (American Elsevier, New York, 1976).

247 The Rt Hon Sir A Mason “Judicial Independence and the Separation of Powers – some positions old and new” (1990) 13 UNSW LJ 173, 174.

248 *Valente v Queen* [1985] 2 SCR 673, applied in *Mackeigan v Hickman* [1989] 2 SCR 796.

249 *Valente v Queen*, above n 248, 709.

250 Justice RD Nicholson “Judicial Independence and Accountability: Can They Co-Exist?” 67 ALJ 404, 405. GP Palmer “Judicial Selection and Accountability”, above n 245. The Rt Hon Sir Ninian Stephen “Judicial Independence” AIJA 21 July 1989, described judicial independence as a state of affairs in which judges are made as immune as humanly possible from influences that may affect their impartiality. See also Steven Parker “The Independence of the Judiciary”, in Brian Opeskin and Fiona Wheeler (eds) *The Australian Federal Judicial System* (Melbourne University Press, Carlton, Victoria, 2000) 64, and K Richardson “A Definition of Judicial Independence” (2005) 2 UNELJ 75.

time to time and place to place to protect perceived judicial impartiality.²⁵¹ Professor Parker has posited the following as arrangements for this purpose:

- appointment procedure for judicial officers based on merit;
- security of tenure and terms and conditions;
- immunity from suit in carrying out judicial duties;
- an ethic of independence and separation of powers;
- institutional separation – even though general administration of a court may be by a state department, decisions of assignment of judges, court listings and sittings should remain with the judiciary;
- institutional support – sufficient resources to do the job so that judges are not seen as supplicants to executive government;
- institutionalised respect – reflected in laws on contempt, for example.

Institutional/administrative independence

- 2.93 Some courts in Australia (the High Court, Federal and Family Courts) have adopted an “autonomous model”, which supports both judicial independence in an extended sense and judicial accountability.²⁵² Judicial leaders in both Australia and New Zealand have recently called for increased administrative independence for the judiciary.²⁵³
- 2.94 However, in a review of models of court governance in Australia, Sallman and Church have noted that judicial control of administration is not necessarily a prerequisite for the preservation of judicial independence. The concept of judicial independence is centrally concerned with judicial decision making, and with ensuring that judicial officers deal with the cases before them solely on the relevant facts and law, free from improper extraneous influences.²⁵⁴ Sallman and Church distinguish between this adjudicatory independence and the administrative (or institutional) independence of the courts.
- 2.95 The major objection to calls for more administrative autonomy for the courts centres on accountability: the executive needs to be accountable, especially in

251 Steven Parker “The Independence of the Judiciary”, above n 251. Professor Parker’s view is that the core value protected by judicial independence is perceived impartiality in adjudication, which is vital for the survival and cohesion of society.

252 Justice RD Nicholson, *Judicial Independence and Accountability: Can They Co-Exist?* above n 250.

253 *Valente v The Queen*, above n 248, 710 referring to an address by Chief Justice Laskin “Some Observations on Judicial Independence” in 1980. The Rt Hon Sir A Mason “Judicial Independence and the Separation of Powers, above n 247; The Rt Hon Sir G Brennan “Principle and Independence” (2000) 74 ALJ 749. See also Chief Justice Rt Hon Sir Thomas Eichelbaum “Political Influences in the Legal Profession” (1993) NZLJ 90 who stated that control over administration and finances went to the heart of the concept because there was no complete judicial independence without an independent source of funding. See also Rt Hon Chief Justice Dame Sian Elias “Transition, Stability and the New Zealand Legal System” FW Guest Memorial Lecture, 23 July 2003, (2003) Otago L Rev, 475; Dame Sian Elias “The Next Revisit: Judicial Independence Seven Years On” [2004] Canterbury L Rev 217, referring to the 1985 UN Basic Principles on the Independence of the Judiciary and “The Beijing Principles, 19 August 1995, paras 36 and 37. These provide that responsibility for court administration must vest in the judiciary or in a body in which the judiciary is represented and has an effective role; and that the court budget should be prepared in collaboration with the judiciary, and should be sufficient to enable each court to function without an excessive workload.

254 Thomas Church and Peter Sallman, *Governing Australia’s Courts*, AIJA 1991, 7.

Parliament, for the courts, and that this is best achieved when the executive is heavily involved in court administration.²⁵⁵

- 2.96 The authors conclude that it is not immediately clear to them why executive administration of the courts adds much more of a threat to adjudicatory independence than the already unavoidable dependence of the courts and the judiciary on the political branches of government for their financial and organisational support.²⁵⁶ However, while they do not believe that judicial control of administration is a necessary prerequisite for preservation of judicial independence, they do conclude that judicial confidence in the administrative machinery of the courts is highest when the judicial officers themselves have a meaningful role in the management of that machinery.²⁵⁷

Conclusion

- 2.97 If the core value to protect is perceived impartiality, this justifies rules and procedures to promote public confidence. Security of tenure and salary is an accepted means of promoting impartiality and judicial independence. Open hearings (and open records of hearings) are also important for protecting impartiality and promoting public confidence.²⁵⁸ Other arrangements may differ according to time and place, as Professor Parker has said.
- 2.98 In terms of permitting scrutiny of records, the preservation of judicial independence is a reason for labelling some information held by judges as exempt from any disclosure regime, if the access to the information interfered with an arrangement designed to promote impartial adjudication, or was somehow damaging to the perceived impartiality of the judicial process.
- 2.99 Examples might be judges' notes and draft judgments made during the process of judicial deliberation, personal communications between judges in terms of collegiate cooperation, judges' internal conference papers, correspondence between a judicial Head of Bench and a judge about that judge's sentencing decision, in response to comments on the sentencing made by a Member of Parliament; or correspondence between the Judicial Conduct Commissioner (concerning a complaint about a judge) and a Head of Bench.

GUIDING PRINCIPLES FOR ACCESS TO COURT RECORDS RULES

- 2.100 From our consideration of the above principles, we conclude that open justice is a cornerstone of New Zealand's justice system, and should be a key guiding principle in an access to court information regime. This is because of the importance of the accountability of judicial decision making and maintenance of public confidence in the administration of justice. Because open justice continues after a case is completed, the presumption should be that court information about particular judicial proceedings should be accessible to the public at any time. Open justice is consistent, too, with the right to freedom of

255 Thomas Church and Peter Sallman, above n 254, 10.

256 Thomas Church and Peter Sallman, above n 254, 12.

257 Thomas Church and Peter Sallman, above n 254, 64–65. The authors concluded that better results can be expected by the judiciary having more rather than less involvement in court policy and administration. This view is supported by the Beijing principles, above n 253.

258 Justice RD Nicholson "Judicial Independence and Accountability": Can they Co-exist? above n 250, 413: adjudicative accountability is manifested in ways including public hearings, with media attending, publication of judgments and decisions subject to appeal.

official information and the public interest in receiving court information, necessitating freedom of expression for the media in imparting it. Developing sound and reliable social policy relating to the making of laws also requires access to, and analysis of, information in court records by researchers.

- 2.101 However, the presumption of accessibility can be rebutted by other important principles. Hence, at times, for justice to be done it may need to be done in private, for example, when vulnerable people such as children or the mentally ill are involved. Generally, Parliament should determine when closed courts and restricted reporting are justified but the courts must also have discretion to determine it in particular cases. Access to records in such cases may need to be limited, especially with respect to personal information.
- 2.102 Open justice generally requires open court records. There may sometimes be other conflicting rights and interests that take precedence over open justice, particularly relating to a fair trial, privacy interests, or rehabilitation. So there may be good reasons for departing from the presumption of openness at some times. Any access to court records regime should provide for such reasons, both by statute and by principled application of discretion.

Principles which should underpin access to court records

RECOMMENDATION

- R1 The principles that should underpin access to court records rules are:
- open justice;
 - freedom of expression;
 - the right to a fair trial;
 - the proper administration of justice;
 - freedom of information;
 - privacy of personal information;
 - the public interest;
 - preservation and availability of historical information;
 - judicial independence.

Chapter 3

“The court record”

3.1 Our terms of reference require consideration of what documentation held by a court should form part of the “court record”, and what administrative documents should be included in the definition. In addition, we are to recommend a disclosure regime both for the court record information and for any other information held by the courts. This chapter concerns the documents currently considered to be the court record, and those about which there has been debate. We then make recommendations as to what information might be included in the “court record”.

COURTS OF RECORD AND THE COURT RECORD

3.2 Most New Zealand courts are “courts of record”, including the Court of Appeal, High Court, District Court and Employment Court.²⁵⁹ A court of record is under an obligation to maintain the record of its proceedings.²⁶⁰ There is no statutory definition of the term “court of record”.

3.3 A court of record has been defined as a court “where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony; which rolls are the records of the court”.²⁶¹ The court rolls were originally the rolls of a manor on which were entered all wills, surrenders, grants, admissions and other acts relating to the manor. They were considered to belong to the lord of the manor, but they were in the nature of public books for the benefit of the tenants as well as the lord, so it was a matter of course that courts of law would grant an inspection of the rolls in a question between two tenants. A court of record also had specific powers. No other court had authority to fine and imprison; so a power to fine or imprisonment made the court one of record.²⁶² Further, a court of record was one where a writ of error lay if a judgment was thought to be wrong.²⁶³

259 For the Court of Appeal see Judicature Act 1908, s 57; for the High Court: Judicature Act 1908, s 3; for the District Courts: District Courts Act 1947, s 3, including the Disputes Tribunals as a division of the District Courts; for the Employment Court, see Employment Relations Act 2000, s 186. The Environment Court has powers inherent in a court of record: Resource Management Act 1991, s 247. A Coroner’s Court has also been held to be a court of record: *Leadbeater v Osborne* (15 May 1991) HC AK, M 2120/89, Anderson J, citing *Halsbury’s Laws of England* (4 ed Butterworths, London, 1980) Vol 9, para 1002.

260 *Mafart and Prieur v Television New Zealand Ltd* (11 May 2006) [2006] NZSC 33, referring to *R v Walwyn* (15 June 1998) CA 6/98, 4.

261 *Blackstone Commentaries on the Laws of England* vol 3 (19 ed London, Sweet & Maxwell, 1836) 24.

262 *Griesley’s Case* (1588) 8 Co Rep 38a, cited in *Halsbury’s Laws of England* (4 ed Butterworths, London, 1980) Vol 10, Courts, 123 para 308.

263 See WS Holdsworth’s *History of English Law* Vol V (Methuen & Co Ltd, London, 1924) 157–161, for a discussion of the meaning of a court of record.

- 3.4 The meaning of the record was discussed in the United Kingdom by Lord Denning in 1957:²⁶⁴

What, then, is the record? It has been said to consist of all those documents which are kept by the tribunal for a permanent memorial and testimony of their proceedings: see Blackstone's Commentaries Vol III, p 2 ... It appears that the Court of King's Bench always insisted that the record should contain, or recite, the document or information which initiated the proceedings and that gave the tribunal its jurisdiction and also the document which contained their adjudication ... but it was never necessary to set out the reasons ... I think the record must contain at least the document which initiates the proceedings, the pleadings, if any, and the adjudication, but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them.

- 3.5 Later decisions confirmed that if reasons for judgment were included they became part of the record.²⁶⁵ On this view, a court record is a collection of those documents that record, for public purposes, the essential proceedings and disposition.
- 3.6 In *Collector of Customs v Graham*²⁶⁶ Eichelbaum CJ held that the expression "the record" is sufficiently wide to include the evidence given at the substantive hearings, including the exhibits presented. In the recent New Zealand decision, *Mafart and Prieur v Television New Zealand Ltd*,²⁶⁷ the Supreme Court discussed the meaning of the court record, noting that the record is conclusive as to the matters formally entered and is notice to the world of them.²⁶⁸ The Court distinguished the formal record (entries in the books and registers maintained by a court, together with other material on court case files recording the essential steps in proceedings and the outcomes) from the remainder of material on case files. This view is consistent with the UK approach to the meaning of the record, cited above.

THE "COURT RECORD" UNDER SEARCH RULES IN NEW ZEALAND

- 3.7 The search rules and statutory provisions governing documents on the court file do not refer in any consistent way to a "court record". Sometimes a distinction is made between the "record" and other documents on a case file, but in practice the terms "court record" and "case file" are often used interchangeably.

Civil rules

- 3.8 The High Court Rules concerning the search of court records refer to registers, indexes, documents, records and files.²⁶⁹ "Document" is defined to specifically include:²⁷⁰

²⁶⁴ *R v Northumberland Compensation Appeal Tribunal ex p Shaw* [1952] 1 All ER 122, 130–131; [1952] KB 338, 351–352.

²⁶⁵ *R v Crown Court at Knightsbridge ex p International Sporting Club (London) Ltd* [1981] 3 All ER 417, 424. The decision concerned the granting of certiorari for error on the face of the record.

²⁶⁶ *Collector of Customs v Graham* [1990] 1 NZLR 615, 617, not following *Clark v Wellington Rent Appeal Board* [1975] 2 NZLR 24, in which O'Regan J had applied *R v Northumberland Compensation Appeal Tribunal ex p Shaw*, above n 264.

²⁶⁷ *Mafart and Prieur v Television New Zealand Ltd*, above n 260, paras 18–27.

²⁶⁸ *Halsbury's Laws of England*, Courts, above n 262, para 308.

²⁶⁹ See High Court Rules, Search of Court Records, r 66.

²⁷⁰ High Court Rules, r 66(13).

- (a) the record of oral evidence given at any hearing other than any notes made personally by the Judge;
 - (b) all exhibits produced in evidence;
 - (c) the record made of the reasons given by the Judge for his judgment, but shall not include any notes made thereof personally by the Judge.
- 3.9 “Document” is more generally and widely defined for the purpose of the rules in High Court rule 3, to include any writing on any material; any information recorded or stored by means of any tape recorder, computer, or other device; and any material subsequently derived from information so recorded; any label or means of identification; any book, map, plan, graph or drawing; any photograph, film, negative, tape or other device on which visual images are embodied so as to be capable of reproduction.
- 3.10 The District Courts Rules 1992 largely mirror the High Court Rules and likewise distinguish between the “registers and indexes of Court records” and other “documents”. Arguably, all registers, indexes and other documents mentioned in the both the High and District Courts Rules are currently part of the court record, including exhibits, but not including notes made by judges personally.

Criminal rules

- 3.11 The Criminal Proceedings (Search of Court Records) Rules 1974 refer to a “register of persons committed for trial and sentence” commonly known as the Return of Prisoners Tried and Sentenced,²⁷¹ indexes to this register, “any document on a file relating to criminal proceedings if a right of search or inspection is given by any Act, or that document constitutes notice of its contents to the public”,²⁷² “a copy of a file pertaining to a criminal proceeding”, “any document or record filed or lodged in the court more than 60 years before” and the “Crown Book”.²⁷³
- 3.12 Documents are defined in the same way as in the civil rules, specifically to include the record of evidence and exhibits produced in court, and the judicial determination, but not any notes made by the judges personally.
- 3.13 For summary cases, section 71 of the Summary Proceedings Act 1957 provides that the registrar of each court, appointed for the exercise of criminal jurisdiction, shall keep “criminal records” in the prescribed form, in which shall be entered a minute or memorandum of all proceedings in the court, signed by the presiding judge or Justice of the Peace or community magistrate. Form 22 of the First Schedule to the Summary Proceedings Regulations 1958 requires this minute to include the name of the court and person charged and prosecutor, particulars of the offence, case number and hearing date, plea and remand dates, and decision

271 The Return of Prisoners Tried and Sentenced lists accused committed for trial, the verdict and their sentence if convicted.

272 For example, company incorporation documents.

273 The Crimes Act 1961, s 353(1) requires the Registrar of the High Court to maintain the Crown Book as a record of the court of the trial. The Crown Book records all criminal cases with details of names of accused, counsel, judge, the charge, and the steps in the hearing (eg, opening address; examination and cross-examination, summing up by the judge, and the disposition). A certificate of matters entered into the Crown Book is evidence as a matter of public record of any indictment, trial, conviction or acquittal. The Crown Book is searchable only with leave.

signed by the judge. A copy of any such entry may be given to any person, but only if the registrar is satisfied they have a genuine and proper interest in obtaining a copy. Such minutes are clearly intended to be the “criminal court record”.

Māori Land Court Rules

- 3.14 The Māori Land Court Rules 1994 explicitly list the documents included in the “permanent record”:²⁷⁴
- the written record of proceedings referred to as “Minute Books”;
 - application files containing all original material relevant to the hearing;
 - originals of all orders or recommendations issued by the Court;
 - any instrument of alienation, statement of account, plan or other document required to be deposited in court;
 - any other record required to be kept or maintained under the Act;
 - any other document that the Court considers necessary to enable the Court to function as a court of record and preserve historical records of title.

Summary

- 3.15 There is no clear definition of the “court record” in the New Zealand rules. Only the Māori Land Court Rules specifically prescribe the documents in the permanent “court record”, and this indicates a wide view of the court record. For civil cases, the High Court and District Courts Rules also suggest a fairly wide view of the court record. Registers and indexes quite clearly are considered to be an official record available as of right in both the civil and criminal rules. For summary criminal cases, the record is the essential particulars of a case, but not the bulk of the material from a case file, nor the evidence.
- 3.16 Until recently, New Zealand jurisprudence in the area of court records has essentially focused on access to various documents, and there has been little specific discussion of what is meant by the court record before *Mafart and Prieur v Television New Zealand Ltd.*²⁷⁵

PRACTICES OF NEW ZEALAND COURTS AND TRIBUNALS²⁷⁶

- 3.17 Court officials consulted mostly viewed the court record as the entire case file, although administrative and case management documents on the file were often not thought to be included. A minority of those consulted thought the court record was only those documents kept as a permanent record.²⁷⁷

Case files

- 3.18 Court staff generally collect together in a court file all documents relevant to a proceeding. A file may contain, for example, initiating documents, pleadings,

²⁷⁴ Māori Land Court Rules 1994, r 165. The Minute Book is the book in which is bound the handwritten or typewritten record of the proceedings of the Court – r 165(a). Some are more detailed than others; in most, the proceedings are recorded more or less word for word. Some are more summarised.

²⁷⁵ *Mafart v Prieur v Television New Zealand Ltd*, above n 260, paras 18–27, see further discussion, below.

²⁷⁶ Information about court practices was collected by Law Commission staff in interviews with court staff in 2004–2005.

²⁷⁷ This was the view of staff in the summary criminal jurisdiction, and corresponds to the approach in Summary Proceedings Act 1957, s 71.

correspondence, memoranda, filed written briefs of evidence not ultimately produced in court, and documents that were produced in court, submissions of counsel, orders and judgments, and sometimes typed transcripts of proceedings.²⁷⁸

- 3.19 Once a case is closed, files are stored typically in basement areas of courts, until a decision is made in accordance with destruction schedules as to which are to be removed to Archives New Zealand. In indictable criminal cases, the Returns of Prisoners Tried and Sentenced and the Crown Books are retained in perpetuity. The latter used to be handwritten and are now recorded on computers where courtrooms have “For The Record” (FTR) recording, then printed and kept in folders.
- 3.20 In the summary criminal jurisdiction of the District Court, however, the file is divided after final disposition, and the information and criminal record sheets (which include the decision) are retained as part of the official record and stored either at the Court or at Archives New Zealand. Everything else on the file (which could include bail notes, probation and pre-sentence reports, victim impact statements, depositions) is kept for seven years if the defendant is not liable to imprisonment, and 10 years if the defendant is so liable, after which it is destroyed.

Exhibits

- 3.21 Exhibits (particularly real, rather than paper, exhibits) are returned to the relevant party in civil cases or to the prosecution in criminal cases where possible, after the appeal period has lapsed. The Police often label their exhibits as property of the New Zealand Police. However, in many cases exhibits are kept (either on or with files) because they are not claimed, unless they are perishable.

Electronic recordings of hearings and transcripts

- 3.22 Most proceedings in courts are electronically recorded.²⁷⁹ These recordings are not always transcribed, especially at District Court level. Often a transcript will only be made when a matter is appealed. The tape or disc is nevertheless kept for a period. Many tapes or discs will have several proceedings recorded on them.

Judges’ notes

- 3.23 In no court consulted were judges’ notes considered part of the record or accessible. This accords with the provisions in the rules that they are not “documents” subject to inspection or search. Sometimes they are kept in a separate part of the file, such as in a sealed envelope in the front of the file. Some judges use “judges’ notebooks”, which are bound red books provided by the Ministry of Justice for personal note taking. These are considered the personal property of the judges and never retained with the file.²⁸⁰

²⁷⁸ The categories of document that are typically found on a criminal file were compiled by the Criminal Practice Committee for their proposed “Criminal Files Search Rules”, prepared in 2004.

²⁷⁹ In the higher courts only the evidence is recorded, not counsel’s submissions.

²⁸⁰ Occasionally judges make notes on other court file documents. In one case, the court held that, as a result, the document (submissions on sentence) became part of the judge’s personal notes (so not part of the record and not accessible): *Amery v Mafart (No 2)* [1988] 2 NZLR 754.

Daily lists and court calendars

- 3.24 Daily fixture lists are posted in public places in the court house to notify the public what proceedings are underway in the various courtrooms. They are not generally considered to be part of the record, and are not retained or filed. They vary from court to court, some containing minimal information (names of parties, time of hearings and courtroom numbers) and others including names of judges, counsel and types of hearing.
- 3.25 The Supreme Court has an online calendar that gives public notice of upcoming proceedings, with some essential details such as case number, name of judge, parties' names, date of hearing, dates when the matter was filed and nature of the claim or appeal. The Māori Land Court has a "Panui", which serves a similar purpose and is published online and gazetted in hard copy.

Electronic case management systems

- 3.26 Most court proceedings are now managed using electronic case management systems. An electronic case management system (CMS) has been introduced progressively since the late 1990s to support the administrative processes of the general jurisdiction courts in the Court of Appeal, High Court and District Court. CMS is a repository for information on the progress of a case, and records which documents are filed and by whom, and what procedural steps are taken.²⁸¹ It contains some details of the information in some court documents, but is not an electronic filing system for documents. It enables internal case tracking, task listing for court officers, document management, rostering and scheduling, and operational reports.²⁸²
- 3.27 For indictable criminal cases the electronic jury trial database (JTS) is a case management system for jury trials. The Supreme Court is currently developing an Appeal Management System (AMS), which is essentially a database similar to CMS, to manage the progression of a case through the Court.

THE COURT RECORD IN OVERSEAS JURISDICTIONS

Australia

- 3.28 An overview of access practices by the Deputy Executive Director of the Australian Institute of Judicial Administration indicates the sort of material that is considered to be part of the record:²⁸³

The practice, in many Australian courts, at least in civil jurisdictions, would be to confine access to material that is used by the court in arriving at its

²⁸¹ Each case record holds details in data form of the parties and their counsel, all applications, outcomes and orders, all charges, pleas, and sentences, all judicial directions, a list of registered documents, copies of all system generated outgoing documents, all service provisions purchased to progress the case, all remands, warrants to arrest, all hearings (dates, parties, judge, court).

²⁸² Information from the Dick Williams, National Business Advisor, CMS, 9 August 2005. The Family Court more recently became part of the system and the Environment Court was linked up in November 2005.

²⁸³ A Wallace, *Overview of Public Access and Privacy Issues*, paper presented at a conference in Queensland, on "Courts for the 21st Century: Public Access, Privacy and Security", November 2003, page 19. "The widespread acceptance of this practice suggests that the notion of access to the court records is linked to the idea of open justice, to the idea that the record of the proceedings conducted in court should be open and transparent. Provision of access to documents used in those proceedings may assist public understanding of the case and promote openness."

determination of the case. This includes pleadings and judgments in concluded proceedings, documents that record proceedings in open court, material admitted into evidence and any other material information that would have been heard or seen by any person present in open court.

- 3.29 The author, Anne Wallace, notes that most civil cases settle before trial, and many court documents are therefore never the subject of any judicial consideration, and simply remain on the court file. She queries whether such documents, although included on the court file, are part of the court record – if the record is confined to those documents used by the court in making its determination. She notes that a narrower definition of what is contained in the court record, than all documents on a court file, may be more appropriate to the purpose for which most of these documents were created.
- 3.30 The County Court of Victoria produced a Discussion Paper in 2005²⁸⁴ that has certain definitions adapted from Anne Wallace’s paper:

Court record – is used to include pleadings, orders, affidavits, transcript, judgments etc, that is to say, documents created by the parties, their counsel, or a judicial official or his/her designate. Correspondence to and from the court and the parties and reports requested by judicial officers will also be considered part of the court record.

Docket information – is used to include documents prepared manually by court staff or automatically by data entered into a computer such as a listing of court records in a court file.

Court file – includes both of the above bearing in mind that some docket information will not be physically in the court file but resides in ledgers or databases.

Canada

- 3.31 The Judges Technology Advisory Committee of the Canadian Judicial Council developed the following definitions in their *Model Policy for Access to Court Records in Canada*, published in September 2005:²⁸⁵
- “Case file” refers to docket information and documents in connection with a single judicial proceeding, such as pleadings, indictments, exhibits, warrants and judgments.
 - “Court record” includes any information or document that is collected, received, stored, maintained or archived by a court in connection with its judicial proceedings. It includes: case files; dockets, minute books; calendars of hearings; case indexes; registers of actions; and records of proceedings, in any form.
 - “Docket” means a data system in which court staff collect and store information about each proceeding initiated before a court, such as: information about the court division and type of case; docket number; names

284 County Court of Victoria *Access to Court Records: Discussion Paper* (County Court of Victoria, Melbourne, 2005).

285 *Model Policy for Access to Court Records in Canada* prepared by the Judges Technology Advisory Committee, approved by the Canadian Judicial Council, September 2005.

and roles of parties; judicial officers and counsel or solicitors of record; nature of proceeding, including cause of action or criminal information or indictment; relief requested; list of documents in the case file; with filing date; dates of hearing; dispositions and corresponding dates.²⁸⁶

3.32 In relation to the definition of the court record, the Committee noted that:

This definition does not include other records that might be maintained by court staff, but that are not connected with court proceedings, such as license and public land records. It does not include any information that merely pertains to management and administration of the court, such as judicial training programs, scheduling of judges and trials and statistics of judicial activity. Neither does it include any personal note, memorandum, draft and similar document or information that is prepared and used by judges, court officials and other court personnel.

United States

3.33 The United States Joint Committee on Court Management of the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) have produced guidelines for public access to court records that provide the following definition:²⁸⁷

"Court record" includes:

- (1) Any document, information, or other thing that is collected, received, or maintained by a court or clerk of court in connection with a judicial proceeding;*
- (2) Any index, calendar, docket, register of action, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created by or prepared by the court or clerk of court that is related to a judicial proceeding; and*
- (3) The following information maintained by the court or clerk of court pertaining to the administration of the court or clerk of court office and not associated with any particular case. [A list of court administrative records and information to be considered part of the court record for purposes of this policy to be added here].*

"Court record" does not include:

- (1) Other records maintained by the public official who also serves as clerk of court. [Courts should identify and list non-court records, for example: land title records, vital statistics, birth records, naturalization records and voter records];*

286 In their earlier report *Open Courts, Electronic Access to Court Records and Privacy*, Judges Technology Advisory Committee for the Canadian Judicial Council, May 2003, page 8 (the "Kiteley" report), the following definitions had been preferred: "Court record" – is used to include pleadings, orders, affidavits etc: that is to say, documents created by the parties, their counsel, or a judicial official or his/her designate; "Docket information" – is used to include documents prepared manually by court staff or automatically by data entered into a computer such as a listing of court records in a court file; "Court file" – includes both of the above bearing in mind that some docket information will not be physically in the court file but resides in ledgers or databases.

287 MW Steketee and A Carlson *Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts* (2002) SJI, National Center for State Courts and the Justice Management Institute (18 October 2002) 3.10, www.courtaccess.org/modelpolicy (last accessed 16 October 2005).

- (2) *Information gathered, maintained or stored by a governmental agency or other entity to which the court has access but which is not part of the court record as defined.*

United Kingdom

The rules and practice: civil cases

- 3.34 For civil cases, the Code of Civil Procedure contains the access rules for the High Court and courts above, which are also followed in the County Courts.²⁸⁸ They refer to the “records of the court” but these are not defined.²⁸⁹ There is a distinction drawn between documents that may be obtained without a court order, notably registers of claims²⁹⁰ and judgments, and those that are searchable only with leave of court.
- 3.35 Case files are retained in accordance with destruction schedules (for example, Queen’s Bench files for seven years, unless of local or historical interest, and Chancery files for 10 years).²⁹¹ Files have a distinct status from the registers. Sir Donald Nicholls in *Dobson v Hastings*²⁹² commenting on the limited right for the public to inspect and copy records, noted:

In other words, a court file is not a publicly available register. It is a file maintained by the court for the proper conduct of proceedings.

The rules and practice: criminal cases

- 3.36 For criminal cases, rule 118 of the Criminal Appeal Rules 1968 provides that, in general, the whole of proceedings on indictment be recorded either in shorthand or by mechanical means. It is the duty of the judge to ensure that, so far as possible, an unchallengeable record is made.
- 3.37 In the Crown Court the “permanent record”, according to the Crown Court Manual 2005, includes the indictment and attached record,²⁹³ committals for sentence and breaches of orders, and appeals.²⁹⁴ There is no generally accepted definition of “court records”. Apart from those documents forming the permanent

288 Discussion with Deputy Court Manager, Liverpool Law Courts, 20 September 2005.

289 However, in *In re Guardian Newspapers Ltd (Court Record: Disclosure)* *The Times* 8 December 2004, Park J said that certain documents for which the applicants sought copies under r 5.4(5) formed no part of the record of the court, including requests for further information and replies thereto.

290 The Civil Procedure Rules, r 5.4, provides that a court may keep a publicly accessible register of claims that anyone who pays the required fee may search. This is a summary of the case process and outcome and is the official court record: discussions with Deputy Court Managers in Wirral County Court and Liverpool Law Courts in September 2005.

291 The Records Officer for the Department of Constitutional Affairs, of which HM Courts Service is the agency for courts, has responsibility for management of all records in the department, from their creation to destruction or transfer to the Public Record office, even though court managers are responsible for management and storage of their own files and other court records locally: Crown Court Manual, April 2005.

292 *Dobson v Hastings* [1992] Ch 394, 401.

293 This Record Sheet consists of names of barristers, court reporters and judges, whether defendant was on bail or in custody, dates of preliminary hearings, arraignment, trial and sentence, numbers of prosecution witnesses and pages of evidence, the offences, pleas, verdicts and sentences. Email from Liverpool Crown Court General Office Manager, 6 December 2005.

294 There are various statutes limiting access, in particular the Rehabilitation of Offenders Act 1974 (limited access to “spent convictions”).

record, files are retained in accordance with time periods specified in destruction schedules, in a similar way to civil records.²⁹⁵

- 3.38 In Magistrates' Courts, for the summary jurisdiction, the record is the register (noting date of case, defendant, charges, remands, outcome and sentence if relevant). The registers are kept in hardcopy in perpetuity (in the court basements and then archived).²⁹⁶

Summary of overseas rules and practices

- 3.39 United Kingdom and Australian law does not clearly define what documents constitute the "court record". In the United Kingdom, it probably accords with Lord Denning's view in *R v Northumberland Compensation Appeal Tribunal ex p Shaw*²⁹⁷ and what is retained permanently as the record sheet in criminal cases.
- 3.40 In contrast, the United States and Canada, in their model rules and guidelines, have recently developed a wide, inclusive view of what amounts to the court record, including any information or document that is collected, received, stored, maintained or archived by a court in "connection with its judicial proceedings", whether or not it is produced at a hearing. But the definition of the court record has not been determinative of access.

AREAS OF UNCERTAINTY

- 3.41 There are some categories of documents or items about which there has been debate and uncertainty as to whether they are part of the court record or whether they are available for search and access. These categories include exhibits that may or may not be retained, search warrant documentation, pre-trial documents that may or may not be adduced at trial or relied on for a judicial determination, and records of convictions.

Exhibits

New Zealand

- 3.42 The issue of access to exhibits, in the form of videotapes, has arisen several times in recent cases, and requests have been considered under the court record rules (apparently because they were evidence produced in open court).²⁹⁸ The fact they may not be owned by the court has not been determinative of access requests.

²⁹⁵ Other documents, such as lists of justices, agendas, jury panels, daily lists and pre-committal bail applications are kept mostly for one year before destruction. Financial and accounting records of witness or juror expenses are kept for seven years, as are juror reports. The Court reporting record (taped recordings of trials) and judges' notebooks, recording notes of proceedings, are kept for five years, with the exception of Lewes Crown Court (to retain one book for each judge annually for possible permanent preservation): Crown Court Manual, April 2005.

²⁹⁶ It would seem that, since about 1995, the registers of current cases have been made and stored electronically but duplicates are still kept in hardcopy: discussion with administration officer at Wirral Magistrates' Court on 21 September 2005.

²⁹⁷ *R v Northumberland Compensation Appeal Tribunal ex p Shaw*, above n 264.

²⁹⁸ *R v Mahanga* [2001] 1 NZLR 641 (CA); *R v Wharewaka* (8 April 2005) CRI 2004-092-4373, HC AK, Baragwanath J. In the latter case the High Court said: "That the media might have been able to copy the videotapes at a stage when the powerful right to see the trial existed does not entail a similar result at this later stage when other interests are to be taken into account."

3.43 In *Amery v Mafart*²⁹⁹ the Court of Appeal declared the videotapes of proceedings³⁰⁰ to be “documents” and part of the court record, subject to the provisions of the Criminal Proceedings (Search of Court Records) Rules 1974 and further directions of the High Court. The accused had earlier consented to them becoming part of the court record.

United States and Canada

3.44 Issues of exhibit ownership have been raised in arguments where access has been resisted in US courts, specifically in *United States v John Mitchell et al Warner Communications*,³⁰¹ where access was sought to the Watergate tapes that had been played in court. The majority, following the relevant court rule,³⁰² held that the strong “common law right” to inspect and copy judicial records extends to exhibits.³⁰³ Although they are returned to owners after appeals, until then, exhibits are in the control and custody of the court clerk and can be released to the public in the interests of open justice.³⁰⁴

3.45 However, in Canada, the Supreme Court in *Vickery v Nova Scotia* has stated that exhibits are not court records of the same order as records such as pleadings or affidavits, because they are often the property of non-parties and at the disposition of the person who produced them, once they have served their purpose in court.³⁰⁵ Different considerations may apply to non-contemporaneous scrutiny of them once judicial proceedings are at an end. Whereas contemporaneous reports are likely to be balanced and in context, the subsequent release and publication of selected exhibits is fraught with the risk of impartiality and lack of fairness. The Court, as custodian of the records, was bound to inquire into the use to be made of them and was fully entitled to regulate that use.

3.46 The position of exhibits is not clear from the jurisprudence. It would seem that they are in the custody of the court unless or until they are returned to their owners, but because this is usually a contingency, they are not always considered to be part of the court record. However, they are included as “documents” in both the civil and criminal search rules. We recommend that exhibits should be included in the record if retained.

299 *Amery v Mafart (No 2)*, above n 280.

300 The proceedings included the entering of guilty pleas by two of the French agents who had carried out an act of sabotage in New Zealand waters, and there was widespread public interest in the case.

301 *United States v John Mitchell et al Warner Communications* (1976) 179 US App DC 293.

302 The rule provides that the record, including transcript and exhibits necessary for the determination of the appeal shall constitute the record on appeal. It was argued that exhibits are not judicial records but are private property and, as such, only temporarily in the custody of the clerk until the case is concluded.

303 This “common law right” was narrowly circumscribed in the United Kingdom and limited to a few people but the US courts viewed limitations as “repugnant to the spirit of our democratic institutions”: *Nowack v Fuller* (1928) 243 Mich 200, 219 NW 749, 750 and granted all taxpayers and citizens access to public records, in part as a check upon dishonest public officials. The right clearly extends to court records in the United States: *Ex Parte Drawbaugh* (1894) 2 App DC 404.

304 The minority judge reasoned that physical exhibits are the personal property of the owner and the fact that they are used in evidence does not divest the owner of title. His Honour considered that ownership was relevant to an access request and would have refused access.

305 *Vickery v Nova Scotia Supreme Court* [1991] SCR 671.

Pre-trial hearing documents

- 3.47 Pre-trial hearings, such as search warrant applications, preliminary (committal) hearings and bail applications are often not held in open court.

Search warrants

- 3.48 Whether search warrant applications and supporting documents³⁰⁶ should be viewed as part of the court record and searchable under the rules is debatable. Search warrants are not issued in open court, because this would destroy the purpose of enabling a search without alerting suspected offenders, hence giving them opportunity to conceal evidence. Issue of a search warrant does require the exercise of a judicial discretion. However, searches pursuant to warrants are part of the criminal investigation procedure, and it can be argued that the documentation is produced at a stage prior to the creation of court records.
- 3.49 While there is no requirement for search and similar warrant documentation to be kept, we understand that recent practice in many courts is to retain such documents. The Law Commission report on Entry Search and Seizure, to be published later this year, will consider the issue of whether or not such documents should be considered to be part of the court record.
- 3.50 Currently, the practice in New Zealand is for the Police to retain warrant documentation on police files. Applications for access are dealt with under the Official Information Act 1982. The Police may refuse disclosure where there is "good reason" because, amongst other things, it would be likely to "prejudice the maintenance of the law, including the prevention, investigation, and detection of offences".³⁰⁷ Informant details can be withheld on these grounds. Where the Police refuse disclosure, the person making the request may appeal to the Office of the Ombudsmen.
- 3.51 A request for search warrant documents has been made to a High Court, in the exercise of its inherent jurisdiction. In a New Zealand decision,³⁰⁸ where there was no prosecution following searches under warrant, the person whose premises were searched applied to the High Court for access to the documentation. The Court ordered that copies of the warrant applications be supplied to both the Police and the applicant, with deletion of paragraphs containing details about the Police informants. Barker J commented that where there was no prosecution resulting from the issue of a search warrant (and thus nothing produced in open court), there was no statutory provision allowing interested people to apply to the District Court for records of the issue of a search warrant. The jurisdiction to allow searches of court records in such a case was far from clear.
- 3.52 In Canada, search warrant applications are considered to be part of the court record,³⁰⁹ and accessible on the same basis as any other type of court record.

306 The discussion could apply also to interception and call data and other warrants.

307 Official Information Act 1982, s18(a), s 6(c).

308 *In the matter of an application by T M Campbell* (26 May 1995) HC GIS, M2/94, Barker J.

309 The Criminal Code 1985, s 487.3(1) provides that a judge or justice may, on application made at the time of issuing a warrant or a production order, make an order prohibiting access to and the disclosure of any information relating to the warrant or production order on certain grounds. In Canada, the applications and related documents are held by the courts.

In the Canadian Supreme case of *Attorney General of Nova Scotia v MacIntyre*³¹⁰ the Supreme Court decided in favour of allowing a public search by a journalist of warrant application documentation after its execution, based on the principle that the general rules of public access to the courts must prevail. The Court held that sworn materials to obtain search warrants are records to which a presumption of public access applies, but only once a warrant has been executed and things seized. However, Dickson J noted the presumption in favour of public access could be rebutted in some cases to protect values of prime importance:³¹¹

At every stage, the rule should be one of public accessibility and concomitant judicial accountability . . . In my view curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of those is the protection of the innocent.

- 3.53 The minority took the position that warrant documentation was not part of the court process under which open justice was necessary. Rather, it was part of the criminal investigative procedure and not analogous to trial proceedings.³¹²

Depositions from preliminary hearings

- 3.54 Historically, committal hearings were more akin to an investigation stage (the Grand Jury) and outside the scope of the open justice principle.³¹³ Section 156 of the Summary Proceedings Act 1957 (following a similar provision in the 1908 statute) stated that the room or building in which any preliminary hearing takes place “shall not be deemed to be an open court”, and persons were not allowed access to the proceedings if the magistrate thought this served the ends of justice. Similar provisions applied elsewhere in the Commonwealth, for example, in the Justices Act 1902 (NSW).³¹⁴
- 3.55 By 1985, however, many of these provisions had been repealed and committal hearings were generally heard in open court in practice.³¹⁵ There are specific statutory exclusions in cases involving sexual offences in some countries, and they are frequently heard “on the papers” (for example, pursuant to section 173A of the Summary Proceedings Act 1957). Preliminary hearings are now part of the open court process. For this reason, we consider that depositions at preliminary hearings should be part of the record, and could only be withheld for reasons such as that the content is likely to jeopardise a fair trial.³¹⁶

310 *Attorney General of Nova Scotia v MacIntyre* [1982] 1 SCR 175; 132 DLR (3d) 385.

311 *Attorney General of Nova Scotia v MacIntyre*, above n 310, paras 62–63.

312 On that basis, access should be restricted to persons who could show a direct and tangible interest in the documents.

313 See Garth Nettheim “Open Justice versus Justice” (1985) 9 Adelaide L Rev 487, 496.

314 See G Nettheim, above n 313, for the situation in the United Kingdom, Australia, the United States and New Zealand at that time.

315 In the United Kingdom, the Tucker Committee in 1958 had reported in favour of publicity of the hearings but recommended that until trial or discharge any report of the proceedings should be limited to neutral facts: *The Report of the Departmental Committee on Proceedings before Examining Justices* CMND 479 (1958). Section 156 of the Summary Proceedings Act 1957 was repealed in 1985.

316 See chapter 7. Note, however, that the Criminal Procedure Bill 2004 proposes to replace preliminary hearings with a committal proceeding that will not involve a hearing.

Bail applications and affidavits

- 3.56 Bail applications may be heard in open court by a judge but are often dealt with by court registrars. However, they do involve an exercise of discretion. Bail decisions are quite frequently appealed to a judge, and must be taken into account in sentencing where a defendant is convicted. In *R v Wharewaka*,³¹⁷ Baragwanath J said:

The previous practice of judges considering bail applications out of court left the media representatives uninformed as for the reasons for decisions. That such applications have come to be dealt with invariably in court in the presence of the media has enhanced both the transparency of bail hearings and overall public confidence in the results.

- 3.57 We endorse Justice Baragwanath's view and consider that bail documentation should be part of the record.

Law enforcement information

- 3.58 Law enforcement information about identifiable individuals (such as lists of prior convictions up to a specific date) is clearly documented on individual criminal case files so, on a wide view, could be considered part of the court record. This information is also held on CMS in relation to individual cases. Compiled lists are not held. However, on-line users could generate lists far more easily than they could do from the hardcopy files.
- 3.59 Information, such as a person's criminal convictions, is not accessible by the public other than the individual concerned. There are two exceptions. One is where that individual consents to access by another. The other is pursuant to the Schedule V of the Privacy Act 1993, whereby law enforcement information about identifiable persons (such as enforcement of fines and other orders, and particulars of the identity of persons who have been charged with offences) can be accessed in a limited way (and for specified purposes) by the Department of Corrections, Police, Legal Services Agency and Ministry of Justice.
- 3.60 In *United States Department of Justice v Reporters Committee for Freedom of the Press*,³¹⁸ a request was made by the Reporters Committee for prior convictions (so-called "rap sheets"³¹⁹) under the Freedom of Information Act, and the request declined. It was held on appeal that disclosure of the contents of an FBI "rap sheet" to a third party could reasonably be expected to be an unwarranted invasion of personal privacy, despite the fact that much of the information on the rap sheet was a matter of public record. It was not contended that the rap sheet was a "court record".
- 3.61 In our view, prior convictions should only be part of the court record to the extent that they are on individual case files, or about a particular individual on CMS. They should not, however, be accessible in relation to a particular case prior to disposal of that case.

³¹⁷ *R v Wharewaka*, above n 298, para 15.

³¹⁸ *United States Department of Justice v Reporters Committee for Freedom of the Press* (1989) 489 US 749; 103 L Ed 2d 774.

³¹⁹ These are records compiled by the FBI and contain histories of arrests, charges, convictions and incarcerations.

A narrow definition of the record

- 3.62 In this view, the court record would include only the initiating document, pleadings and adjudication, as well as registers and indexes. This is consistent with the approach that only the essential documents were retained as a permanent record for time immemorial. In *Mafart and Prieur v Television New Zealand Ltd*,³²⁰ the Supreme Court referred to the "formal record" as constituting the entries in the books and registers, as well documents maintained by courts which are formal steps in proceedings, and outcomes. Such a "formal record" will, in many cases, be the record that is eventually retained for archiving.
- 3.63 The problem with adopting this concept of the formal record is that it would consist partly of material on case files and partly of material in registers and indexes (which refer to multiple cases), leaving also another category of "other material" such as electronic recordings of cases, calendars and daily lists, all of which, in our view, is part of the total court record.
- 3.64 In her response to the consultation draft, the Chief Justice favoured the distinction between the formal record and the remainder of case files, and said that a presumption of access should apply only to the formal record, to material received at a hearing (for purposes of accurate reporting) and to all material when archived. However, our view is that a presumption of access should apply to all records insofar as they are retained, although there will be good reasons for withholding access in some cases. The concept of the formal record as determinative of access is also slightly problematic as at present criminal registers are not, in practice, accessible as of right because of the Criminal Records (Clean Slate) Act 2004.³²¹

Linking the record to the documents used in the court hearing

- 3.65 A more widely defined court record would include affidavits, briefs of evidence, pleadings, exhibits and submissions to the extent that the information in the documents was relied upon at the hearing and for judicial determination. It would also include the transcript (if any) of the electronic recording, registers and indexes, calendars and duplicative information on case management systems referring to the proceedings. Such a definition would be consistent with records that are typically accessible under the common law once they have been produced in court. For cases that settled prior to a hearing, the record would be only the initiating document and any documentation from interlocutory hearings or case conferences. This would mean that the content of the record would vary widely from case to case and would make it difficult for court staff to distinguish which documents were or were not part of the record.

320 *Mafart and Prieur v Television New Zealand Ltd*, above n 260, para 21. The Court noted currently matters of formal record are generally available to be freely searched.

321 See discussion in chapter 5.

A wide definition

- 3.66 In this view, the court record includes all documents collected in connection with particular judicial proceedings, that is, the entire case file, including exhibits. Jury lists for specific cases would be included where they are on case files, subject to the provisions of the Juries Act 1981. Sections 12 and 14 of this Act provide for access to district jury lists and to jury panels for particular trials.³²²
- 3.67 Judges' notes have traditionally not been included as part of the court record. In our consultation draft, we included judges' notes as part of the record (although they were not necessarily accessible) but, following several submissions,³²³ we have reconsidered this matter, and concluded that judges' notes, draft judgments, research clerks' opinions and other documents pertaining to the deliberation process of a judgment should be excluded from the court record. Judges need to be able to shut the doors of their chambers and work freely and independently before they walk into the courtroom and perform their public functions. The material relating to their deliberations should not be part of the court record.
- 3.68 All registers and indexes would be included as part of the court record, as now, but so also any calendars or daily lists, information about particular judicial proceedings on case management databases and electronic recordings of court hearings would be part of the record.
- 3.69 Assuming all such material were to be potentially accessible (unless there are good reasons for withholding it), the record so defined would be more in keeping with the spirit of open justice and the right to freedom of information. It is similar to the definition in the United States and that recommended in Canada. It is also consistent with the definition in the New Zealand draft criminal rules.³²⁴ A final advantage of this definition is that it should be clear for operation by court staff once access rules are in place.
- 3.70 The definition of the court record is not intended to be determinative of access, and access to some material held as part of the record will still require leave of a judge. Nor is the definition of the record determinative of what is retained for archives as a permanent record. As discussed in chapter 9, we do not propose any changes to the current destruction schedules agreed between the Ministry of Justice and Archives New Zealand.

322 Juries Act 1981, s 12 provides that the registrar of the court to which a particular jury list relates, must ensure the list is kept confidential to the registry staff, although the list may be disclosed by order of the court or a judge for purposes of any proceedings relating to the validity of a jury list or jury panel, or eligibility of a juror. Section 14 of the Act provides that jury panels may be inspected not earlier than five days before the commencement of the week for which the jurors on that panel are summoned for jury service. Note that the Criminal Procedure Bill 2004 proposes to amend s 14 to restrict inspection to the parties or their representatives, and the Police, and a new s 14A would restrict dissemination of the jury panels. See *Case No W 40179*, 12th Compendium of Case Notes of the Ombudsmen, 165, holding that information about how a jury panel was summoned for a particular trial was not subject to the Official Information Act 1982, the court registrar holding the information as an officer of the court.

323 Submissions opposing the inclusion of judges' notes in the court record were received from the Chief Justice, the District Court judges and the New Zealand Law Society.

324 "Criminal Files Search Rules", draft of 10 June 2004 by the Criminal Practice Committee.

RECOMMENDATION

- R2 A wide definition of the court record should be adopted, and the court record divided into “case files” and “other records”. The “other records” would include registers, including the Return of Prisoners Tried and Sentenced, indexes, daily lists, calendars and electronic recordings of hearings, the Crown Book, and information about particular judicial proceedings on electronic case management databases.

RECOMMENDATION

- R3 The criminal case file would include:
- informations and indictments;
 - depositions for preliminary hearings;
 - bail documentation;
 - jury lists for specific trials, subject to the Juries Act 1981;
 - exhibits and exhibit lists;
 - medical, psychological, psychiatric pre-sentence and other reports;
 - lists of previous convictions for a particular case;
 - victim impact statements;
 - pre-trial applications and affidavits;
 - counsels’ submissions, where provided;³²⁵
 - transcripts of hearings;
 - all orders and judgments;
 - correspondence for particular judicial proceedings.

RECOMMENDATION

- R4 The civil case file (including Family Court, Employment Court, Environment Court) would include:
- notice of proceedings;
 - pleadings;
 - exhibits and exhibit lists;
 - medical, psychological, psychiatric or other reports;
 - case conference material;
 - interlocutory applications and affidavits;
 - counsels’ submissions, where provided;
 - transcripts of hearings;
 - all orders and judgments;
 - jury lists for specific trials, subject to the Juries Act 1981;
 - correspondence for particular judicial proceedings.

325 Note that counsel’s submissions would not include attached cases.



Chapter 4

Information held by courts

CATEGORISING INFORMATION

- 4.1 In the previous chapter, we discussed the documentation that should form part of the court record. The terms of reference also ask us to consider the principles and rules that should govern disclosure of documentation held by a court that is *not* part of the court record. To do this, we need to identify the other categories of information that the courts hold.
- 4.2 This is not as straightforward as it sounds. The courts are managed and administered by the Ministry of Justice, and court staff, with a few exceptions, are employees of the Ministry. This can lead to a lack of clarity as to what is held by the Ministry and what is held by the courts. In terms of disclosure, the distinction is important, because the Ministry of Justice is a department that is subject to the Official Information Act 1982, but the courts are not.³²⁶ In other words, where information is held by the Ministry, the Official Information Act 1982 applies, but if it is held by a court, the Official Information Act 1982 does not apply.
- 4.3 The effect of this exclusion has been considered by the courts in the context of information held on case files. In *Amery v Mafart (No. 2)* the High Court referred to “the specific exclusion of Court records from the ambit of the Official Information Act”, going on to note:³²⁷
- Section 2(6)(a) makes it clear that the Act does not extend to information held by a Court.*
- 4.4 At least where the information in question is a court record, it is clear that the Official Information Act 1982 will not apply (although the potential for court record documents to be held concurrently by a department or ministry, as well as by the court, and therefore to be accessible under the Act, was noted by the Court of Appeal in *R v Mahanga*).³²⁸ But the courts hold a range of

³²⁶ Official Information Act 1982, s 2(6).

³²⁷ *Amery v Mafart (No. 2)* [1988] 2 NZLR 754, 758. In *L v Police* [2000] 2 NZLR 298 (again an application for material from the case record) the High Court also referred to s 2(6)(a) and noted that the Official Information Act 1982 does not apply to courts.

³²⁸ *R v Mahanga* [2001] 1 NZLR 641 para 34.

information other than court records. The question of whether that information is also excluded from the Official Information Act 1982 is more difficult.

- 4.5 The Ministry of Justice’s starting point when requests for information are received is to ask, who holds the information? If it concludes that it is held by the ministry, then the Official Information Act 1982 applies. The ministry considers that the Act applies to information held by it even if that information duplicates material on a case file, which would otherwise be accessible only under the rules of court, a view that is consistent with the comments made by the Court of Appeal in *Mahanga*.³²⁹
- 4.6 However, if the Ministry holds the information *solely* as agent for the courts, or for the *sole* purpose of safe custody on behalf of the courts, that material is excluded from the definition of official information.³³⁰
- 4.7 In our consultation draft, we recommended that section 9 of the Official Information Act 1982 should be amended to include a judicial independence exception, to ensure that the Ministry is not obliged to disclose material it holds that involves matters of judicial independence. In her response to the consultation draft, the Chief Justice expressed the view that such an amendment is unnecessary:

As long as the distinction between court administration and judicial administration is maintained, disputes by the Ministry about access to the information it holds . . . should be amenable to the Official Information Act and subject to review by the Ombudsman. No matters touching judicial independence are within the control of the Ministry. Judicial communication and information held by the judges is outside the regime of official executive information. There is therefore no need for a ground of “judicial independence” for withholding information. It is not information amenable to disclosure.

- 4.8 However, we understand that this distinction is not always easy to draw. The Ministry sometimes holds information in its executive capacity that it is concerned might touch on matters of judicial independence. The Chief Justice further notes in her response that there should be a division between official information maintained by the executive relating to court operations, and judicial information (which is not official information at all). Unfortunately, that division does not appear in the Official Information Act 1982 in those terms. If the Ministry holds information relating to the judiciary (other than solely as agent), then that information is official information and subject to disclosure under the Act.

329 Discussion with Roger Howard, Ministry of Justice, 21 February 2006.

330 Official Information Act 1982, s 2(1) “official information” (f).

Information held by a court

- 4.9 The information that could be described as being held by a court includes:
- (a) separate or collated administrative information and statistics taken primarily from case management systems to enable the ministry to efficiently budget, plan and administer the court system, such as information on the relative costs of proceedings; use of courtrooms and deployment of court staff and so on;
 - (b) information relating to court staff personnel matters;
 - (c) information on court files in relation to particular proceedings, that is, case files, including judges' notes and drafts of judgments;
 - (d) information relating to particular case files held on any hardcopy or electronic case management systems, such as charges/claims, names of parties, dates of appearance, sentence, daily lists, calendars;
 - (e) internal communications between judges and judges and administrative personnel relating to judicial administrative and management matters, via email or hard copy;
 - (f) correspondence and other information relating to liaison between the judiciary and the Ministry concerning the management and administration of judicial matters;
 - (g) minutes of committee meetings of the judiciary, or of meetings including members of the judiciary and representatives of the Ministry of Justice;
 - (h) separate or collated information relating to the rostering of judges, judicial activity information and judicial activity statistics that identify particular judges;
 - (i) judicial personnel matters such as salary, leave and sabbatical records that have not been anonymised, including allocations of technology, personal expenses records, judicial training programmes, attendance at overseas conferences.
- 4.10 A number of inconsistencies arise because of the way the Official Information Act 1982 operates. Whether the Act applies to certain court-related information, such as judges' memoranda, may turn on the question of whether the Ministry also holds that information – for example, if it was appended to correspondence or minutes – rather than on any point of principle.
- 4.11 The Ministry sends representatives to a number of committees made up of members of the judiciary, and holds copies of the minutes of those meetings, which would be subject to the Official Information Act 1982. Examples include the Courts Executive Council, the management committees for the various courts, the Judicial Libraries Management Board and the Courthouse Design Committee.
- 4.12 A further issue is that there may be some information held by the courts to which no disclosure regime applies, particularly information held by the judiciary.
- 4.13 On analysis, the information listed above falls into three broad categories:
- Information collected and held by the Ministry as a branch of the executive. This includes the information listed at sub-paragraphs (a) and (b) above.

- Information collected and held in relation to a judicial function (that is, the court record). This includes the information listed at sub-paragraphs (c) and (d) above.
- Information collected and held mainly in relation to the management and administration of judicial affairs. This includes the information listed at sub-paragraphs (e) to (i) above.

Information collected and held by the Ministry of Justice as a branch of the executive

- 4.14 Some court-related information rightly falls under the Official Information Act 1982 and the Privacy Act 1993, because the information is collected and held by the Ministry of Justice as a branch of the executive. This includes information and statistics used to enable the Ministry to plan, budget and administer the court system, some of which may be drawn from electronic case management databases. It would also include information relating to staff.
- 4.15 The Ministry of Justice has expressed concern that, potentially, people might use the Official Information Act 1982 to try to gain access to information in relation to a particular judicial proceeding that is held on databases such as the Case Management System (CMS). This argument is based on a view that the Ministry administers CMS and therefore holds the information for the purposes of the Act.
- 4.16 We understand the concern raised, and it illustrates the difficulty inherent in the Official Information Act 1982 applying to a department that administers an entity which is itself exempt from the provisions of the Official Information Act 1982. However, we believe that the Act cannot be applied to CMS in this way. There has never been a suggestion that the provisions of the Official Information Act 1982 could be used to directly access case files – such requests are referred to the court, and the rules of court apply.
- 4.17 The fact that some court record information is held in electronic form on CMS should not alter that principle, and, in our view, the Ministry would be justified in refusing to consider requests for access to that information under the Official Information Act 1982. It seems unlikely that the Court of Appeal in *Mahanga*³³¹ was suggesting that case documents could be requested from the courts' management system under the Official Information Act 1982 on the basis that the system was administered by the Ministry. In our view, it is more likely that the comment referred to situations where the Ministry holds a copy of a document that also appears on a case file.
- 4.18 In our consultation draft, we indicated that if, after consultation, it was apparent that there was real doubt in this area, we would recommend that the Official Information Act 1982 should be amended to make it clear that the Act does not apply to records of particular cases held on case management databases. The Ministry of Justice, in its submission, indicated that this would be a welcome recommendation, for the sake of clarity.

³³¹ *R v Mahanga* above n 328.

RECOMMENDATION

- R5 The Official Information Act 1982 should be amended to make it clear that the Act does not apply to records of particular cases held on case management databases maintained by the Ministry of Justice.

DISCLOSURE
OF OTHER
INFORMATION

- 4.19 The other two categories described above, namely information collected and held in relation to a judicial function, and information collected and held mainly in relation to the management and administration of judicial affairs, are not covered by a comprehensive disclosure regime at present.
- 4.20 In our consultation draft, we recommended that access to this information should be covered by Part 1 of a new Act, to be called the Court Information Act. Part 2 of this Act would deal with requests for access to case records held by the courts. However, following consultation, we no longer consider that Part 1 of the proposed Act is necessary.
- 4.21 There is some information in relation to the management and administration of judicial affairs in which the public clearly has a legitimate interest, and which should be accessible to the public. These are matters involving the expenditure of public money, such as salaries, allowances, travel, money spent on court buildings, judicial chambers, libraries and security. But other information in this category may relate to sensitive judicial matters, or may impinge on judicial independence.
- 4.22 In our consultation draft, we took the view that there is a strong rationale for the principles underlying the Official Information Act 1982 to apply to information held by courts about the way in which the court system is administered and managed, including information about the management and administration of judicial affairs. We therefore recommended that Part 1 of the proposed Court Information Act should deal with this information.
- 4.23 Submissions in response to the consultation draft raised two important issues, which led us to review this recommendation. First, it appears that there is very little information that would be disclosed under Part 1 of the Act that is not already available under the Official Information Act 1982. Secondly, the proposal raised concern among the judges as to their constitutional position.

How much information would be available under Part 1 of the proposed Act?

- 4.24 During consultation on our draft proposals, it became apparent that, in fact, there was little information that would fall under Part 1 of the Act that was of public interest and was not already available under the Official Information Act 1982, or that was of public interest but would not be legitimately withheld for one of the reasons we proposed in our framework, such as privacy or judicial independence.
- 4.25 The District Court judges made the point that any information touching on financial matters, such as costs of travel, training and conferences, is held by the Ministry of Justice and therefore already available under the Official Information Act, as are copies of correspondence between the judiciary and the Ministry

relating to matters of judicial administration. Other information not held by the Ministry but held by the judges, such as material relating to appointments, complaints, or correspondence between judges, would all be likely to be withheld on the grounds of privacy.

- 4.26 The Ministry of Justice in consultation agreed with this view, but suggested that Part 1 of the proposed Act would enable the Ministry to transfer requests for information touching on matters of judicial administration to the judiciary for response. The Ministry continues to be concerned about the possibility of having to disclose material it holds under the Official Information Act 1982 where that material may include sensitive judicial information.
- 4.27 We appreciate the difficulties the Ministry faces in this regard, but, in our view, if there is a problem with the application of the Official Information Act 1982, that should be resolved by an amendment to that Act.

Constitutional position of the judges

- 4.28 In submissions, judges at all levels of the court system were deeply concerned that the introduction of Part 1 of the proposed Court Information Act would have significant implications for the constitutional position of the judges. In particular, the proposal that complaints about decisions to withhold information under Part 1 of the Act would be reviewed by the Office of the Ombudsmen was seen to create a risk to the independence of the judiciary.
- 4.29 We agree that the mechanism of review by the Ombudsmen is potentially problematic in terms of the constitutional position of judges. We had proposed the possibility of a veto by the Chief Justice as one way of dealing with this issue. However, we accept the point made by the District Court judges that this might place the Chief Justice in an invidious position of having to act either as umpire between the Office of the Ombudsmen and a Head of Bench, or be opened up to political criticism for trying to protect the proper interests of the judicial process.
- 4.30 We also agree that matters of judicial administration, such as communication between judges, would be properly withheld on the grounds of judicial independence. Given that, and that there is little other substantive material that would be made available, we do not recommend including information relating to the management and administration of judicial affairs in the proposed Court Information Act.

Judicial information and the Official Information Act

- 4.31 Like the Ministry of Justice, we remain concerned that there is a grey area of material held by the Ministry that touches on matters of judicial administration that might be requested under the Official Information Act 1982, but which ought not to be released for reasons of the independence of the judiciary. However, unless the information can be withheld for one of the reasons set out in the Official Information Act 1982, the Ministry might find itself obliged to disclose it. At present, judicial independence does not figure as a reason for withholding. We remain of the view that there is merit in considering an amendment to section 9 of the Official Information Act 1982 to include a judicial independence exception.

- 4.32 This part of the review has raised issues of importance and concern that cannot be resolved in this report. In our view, the way in which the Official Information Act 1982 applies in the context of the relationship between the Ministry of Justice and the judiciary needs to be clarified, to ensure that the constitutional position of the judges is fully protected.

Chapter 5

Court Information Act and new rules of court

COURT INFORMATION ACT

- 5.1 We recommend the enactment of a Court Information Act to establish the regime for access to court records. Following consultation, we remain of the view that the most suitable model for the framework to apply to court records is that set out in the Official Information Act 1982, which starts from a presumption of accessibility.
- 5.2 There was general agreement during consultation that the present situation in relation to access to court records was unsatisfactory. Where there are rules, they are often ad hoc, inconsistent and incomplete. For detailed guidance, applicants and judges need also to be conversant with a wide range of cases, and even then, the principles established vary and sometimes conflict. Submitters agreed that applications for access to court records can raise issues of fundamental importance.

RECOMMENDATION

- R6 A Court Information Act should be enacted to establish a regime for dealing with access to court records. The presumption underlying the Act will be that court records will be accessible unless there is good reason to withhold them.

- 5.3 There was also agreement that a single code was desirable, to establish broad consistency across jurisdictions, but that differences between those jurisdictions must also be accommodated. In our view, there is no doubt that there is a need for the enactment of a statute to establish a regime for access to court records. We now turn to consider the detailed content of the proposed Court Information Act.

Purposes of the Act

- 5.4 The purpose of the Act is to provide clear and consistent rules for:
- (a) The greater availability of court records in the public interest, particularly in the interests of:
 - the principle of open justice;
 - freedom of information;
 - freedom of expression;
 - the availability of historical information.
 - (b) The limiting of availability of court records only in accordance with specific rights and principles, consistent with:
 - the right to a fair trial, including the presumption of innocence;
 - the proper administration of justice;
 - the protection of privacy and sensitive information;
 - the independence of the judiciary.

Court record information under the Act

- 5.5 In chapter 3, we recommended the adoption of a wide definition of “court record”, comprising case files and other records, such as registers, indexes, daily lists, calendars, electronic recordings of hearings and information about particular judicial proceedings on case management databases. These “other records” contain information about a number of judicial proceedings, whereas case files relate to a particular proceeding.
- 5.6 There is a range of models that could be adopted for managing access to these court records. At one end of the spectrum, all court records could simply be generally available to the public.³³² On the other hand, access to court records could be restricted solely to the parties, except with leave of the court.³³³
- 5.7 The regime we recommend for access to court records balances the various and sometimes competing principles identified in chapter 2. Open justice is a key factor in assessing the appropriate rules regime to apply in New Zealand, but it is not the only principle at stake. While a model allowing general access to court records at any time would be open and simple, it could operate at the expense of other important principles, such as privacy and the right to a fair trial, and would not always best serve the proper administration of justice.
- 5.8 The starting presumption for access to court records should be one of accessibility, for reasons of open justice and freedom of information. However, the framework

332 As noted in chapter 2, in Queensland, court records are widely available to the general public. In civil cases, on payment of a fee a person is entitled to search and inspect documents on a court file, subject to any court order restricting access, or to the court requiring the document for its own use – Uniform Civil Procedure Rules 1999 (Qld), s 81. In criminal cases, on payment of a fee a person may search or inspect a court file or document other than an exhibit or indictment, and obtain a certified copy of details noted on an indictment unless there is a court order restricting access, or a court officer thinks giving the details may put a person’s safety at risk: Criminal Practice Rules 1999 (Qld), s 57.

333 In New South Wales, this is the case in civil proceedings: Supreme Court Practice Note SC Gen 2, dated 17 August 2005. In Victoria, a document filed in a proceeding to which the Supreme Court (Criminal Procedure) Rules 1998 apply is not open for inspection unless the Court or a relevant officer of the Court so directs: r 1.11(4).

for access should include legitimate reasons to withhold information where this is necessary to give effect to other critical principles.

- 5.9 The resulting framework is similar to the Official Information Act 1982, but, unlike that Act, it needs to be implemented by detailed rules of court, to ensure firstly that some categories of document can be made accessible without the need to have each document considered on a case-by-case basis, and secondly to allow considerations specific to certain jurisdictions to be taken into account.
- 5.10 The Court Information Act therefore serves two purposes. First, it operates as a policy template for the creation of rules of court. The rules must be consistent with the principles set out in the Act.
- 5.11 Secondly, where the resulting rules of court provide that access to a particular document held on the case file is available only with leave of a judge, the Act provides the factors to be balanced by the judge in deciding whether there is good reason to withhold the document.

The access rules

- 5.12 The Court Information Act should provide for the making of rules. Because the access rules will be lengthy and detailed, we consider it is necessary for them to be set out in schedules to the Act, or in subordinate legislation, rather than in the body of the statute.

Guiding principles for the rules

- 5.13 There should be a clear requirement in the Court Information Act that the access rules are to be consistent with the purposes and principles of the Act, that is, the presumption of accessibility and the reasons for withholding information. These principles would be the main factors to be taken into account in settling the precise content of the rules. The rules should specify the time limits within which access should be granted.
- 5.14 Besides the civil and criminal rules, there will need to be some special rules for particular jurisdictions. For example, in Family Court cases, privacy considerations take on an enhanced importance compared with the business in other courts. Further, there are now some statutory restrictions on rights of search in matters such as adoption and it is not proposed to disturb these.
- 5.15 In the consultation draft, we recommended that the High Court Rules Committee, supplemented by additional members and observers, should be charged with drafting the rules for all jurisdictions. However, this proposal raises some difficulties. It would require significant extension to the jurisdiction of the Rules Committee, because rules of some other courts and jurisdictions are currently made and implemented by a variety of mechanisms. Even if this was successfully achieved, if the new rules were then added to the existing rules or regulations that govern the various jurisdictions, there is a risk of inconsistency arising over time.
- 5.16 The most effective way to ensure a coherent and consistent regime across the justice sector is to implement the new rules through the Court Information Act, either as schedules or regulations under the Act.

- 5.17 Consultation will be essential in the drafting of the rules, however they are implemented. An advisory committee should be established under the Act for this purpose, comprising the Chief Justice and one other High Court judge, the Chief District Court Judge and one other District Court judge, the Chief Executive of the Ministry of Justice, two barristers and solicitors nominated by the Council of the New Zealand Law Society, the heads of specialist jurisdictions or their nominees, a representative of the Police, the Chair of the Criminal Practice Committee, a nominee from the Commonwealth Press Union and the Chief Archivist.

RECOMMENDATION

- R7 The Court Information Act should provide for the making of rules to govern access to court records. The rules should be set out in schedules to the Act, or in regulations made pursuant to the Act. The Act should establish an advisory committee for the purposes of consultation as to the content of the rules.

Application of the Court Information Act

- 5.18 The Court Information Act should apply to all courts and the Disputes Tribunals, with the exception of the Coroner's Court. As noted in chapter 1, material held by the Coroner's Court is held by the Ministry of Justice, and is accessible under the Official Information Act 1982 or Privacy Act 1993. We do not propose any change to these provisions.
- 5.19 As noted earlier, the Government has agreed with the Law Commission's recommendation that proceedings of the Disputes Tribunals should be open to the public. Once that recommendation is implemented, the Disputes Tribunals Rules 1989 should be amended to reflect the presumption that a court record should be accessible unless there is good reason for withholding it.
- 5.20 Until that time, we recommend that court records in the Disputes Tribunals should be treated in a similar way to those in family proceedings and other hearings held in private, by inclusion in a list of statutory proceedings that may provide good reason for withholding the information sought, but that may be outweighed by other considerations. However, where Disputes Tribunals matters are appealed to the District Court, those appeals are open, and the records should not be subject to special restriction.

Māori Land Court

- 5.21 The Court Information Act should apply to the Māori Land Court. However, because the current rules of the Māori Land Court allow for broad public access to records of the court, we do not consider any changes are required to them to meet the purposes of the Act.

RECOMMENDATION

- R8 The Court Information Act should be implemented by detailed rules of court in all jurisdictions, with the exception of the Coroner's Court.

Retrospective nature of the proposed new rules

- 5.22 We recommend that the new rules should apply to existing records. The New Zealand Law Society (NZLS) proposed that any new rules should only have prospective application, submitting that people would have provided documents to the courts in the expectation that access would be governed by the existing law.
- 5.23 The general principle is that statutes and regulations operate prospectively, and do not affect existing situations.³³⁴ In reality, a great deal of new legislation has implications for matters already in existence. However, not all legislation that is clearly retrospective is equally unjust or objectionable:
- In essence, retrospective legislation is only objectionable if it takes away existing rights, renders unlawful things that were lawful when they were done, or attaches a tax or other liability to something done in the past.*³³⁵
- 5.24 One valid consideration is whether it is necessary for effective administration for the law to apply to existing situations. In a report published in 1990, the Law Commission noted institutional and procedural changes, such as establishing new courts or settlement processes, may be impossible or difficult to introduce piecemeal, with, for instance, one court existing for older cases and a new one for new cases.³³⁶
- 5.25 In the present situation, we consider that there is a good argument for the rules to apply to existing records. If the new rules were to be prospective only, there would need to be two regimes running indefinitely in relation to all court records. The administrative cost would be considerable, as would the potential for confusion. A prospective regime would also fail to remedy one of the problems currently faced by Archives New Zealand and the courts, that, at present, all requests for criminal trial files have to be approved by the Minister.
- 5.26 Further, it is far from certain that people who have lodged documents with the courts in the past have any expectations as to how the existing law will protect them. Even if they have turned their minds to the issue, in many cases there is no current access regime set out in rules – for example, in the summary, environment and employment jurisdictions. In civil cases, members of the public can already access files before or during a hearing with leave, and once the proceeding is over the file is open to the public without leave for six years.
- 5.27 In criminal cases, the file is currently closed after completion of proceedings, and leave is required for access. The proposed new rules would make some material available without leave, mainly material that could have been seen or heard in open court. Other sensitive material will continue to require leave until many years after the hearing, as at present.
- 5.28 In summary, we do not consider that the effect on people who have lodged material with the courts justifies the administrative problems and inefficiencies

³³⁴ Section 7 of the Interpretation Act 1999 provides that enactments do not have retrospective effect.

³³⁵ J Burrows *Statute Law in New Zealand* (3 ed, LexisNexis, Wellington, 2003) 403.

³³⁶ New Zealand Law Commission *A New Interpretation Act: To Avoid "Proximity and Tautology"* (NZLC R17, Wellington, 1990) V.

that would result from making the new rules as to access prospective only. We recommend that the new rules apply to existing records.

RECOMMENDATION

R9 The new rules should apply to existing records.

FRAMEWORK OF THE COURT INFORMATION ACT

Presumption of accessibility

- 5.29 The presumption of accessibility should underpin the Court Information Act: a court record should be accessible unless there is good reason for withholding it.
- 5.30 There will be a number of reasons that justify withholding information held on a court record. Some of these reasons will be conclusive, while others can be outweighed in a particular case by other considerations that render it desirable in the public interest to make the information accessible. Generally, where one of these reasons operates, the result will be a rule that leave of a judge is required to access the court record in question.

Conclusive reasons for withholding information

RECOMMENDATION

R10 A conclusive reason for withholding will exist if the making available of the information held on a court record would be likely to:

- (a) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences;
- (b) prejudice the right to a fair trial; or
- (c) endanger the safety of any person; or
- (d) prejudice the proper administration of justice; or
- (e) prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or
- (f) prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government, or any international organisation.

Right to a fair trial

- 5.31 As discussed in chapter 2, the right to a fair trial could be a conclusive reason for withholding information until a case is finally determined, particularly in criminal cases in the light of the presumption of innocence.

Security of New Zealand

- 5.32 A spy trial, or the trial of a suspected terrorist, or a high-profile detention case could involve highly sensitive information which there may be conclusive reason to withhold from general public dissemination.

Other reasons for withholding, which may be outweighed

RECOMMENDATION

- R11 Where one of the following reasons applies, good reason for withholding information on a court record may exist unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations that render it desirable, in the public interest, to make that information accessible. This exception will operate only if:
- (a) Withholding is necessary to protect information where the making available of the information:
 - would disclose a trade secret; or
 - would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information.
 - (b) Withholding the information is necessary to protect information that is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information:
 - would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or
 - would be likely otherwise to damage the public interest.
 - (c) The court record relates to a proceeding involving defamation, property disputes arising out of agreements to marry, proceedings at first instance in the Disputes Tribunals, or to a proceeding under any of the following statutes:
 - Adoption Act 1955;
 - Children, Young Persons, and Their Families Act 1989;
 - Family Proceedings Act 1980;
 - Property (Relationships) Act 1976;
 - Family Protection Act 1955 and Status of Children Act 1969;
 - Marriage Act 1955;
 - Civil Union Act 2004;
 - Care of Children Act 2004;
 - Harassment Act 1997;
 - Mental Health (Compulsory Assessment and Treatment) Act 1992;
 - Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003;
 - Protection of Personal and Property Rights Act 1988;
 - Alcoholism and Drug Addiction Act 1966.
 - (d) Withholding the information is necessary to protect the privacy of natural persons (including deceased natural persons).
 - (e) Allowing access to the court record would be contrary to court order.

- 5.33 Many of the reasons set out above that may operate to rebut the presumption of accessibility will be self-explanatory, and are discussed in chapter 2 (Principles) but others require some explanation, or examples of how they might operate in practice.

Specified statutes

- 5.34 Currently, the High Court and District Courts Rules provide that no file and no document upon any file shall be searched, inspected or copied that relates to proceedings under certain specified statutes, although leave to search can be given by the registrar, and must be given to a person having a “genuine or proper interest”.
- 5.35 Some of the statutes listed in the rules have been repealed or renamed.³³⁷ In chapter 2 (Principles) we discussed the listed statutes, and reviewed the rationale for restricting access to court records in proceedings under most of those that continue in force. In our view, there is justification for continuing the restrictions imposed in relation to the statutes set out above where they involve highly personal facts, and/or people who are particularly vulnerable by reason of age or illness.
- 5.36 We also recommend restricted access for records relating to first instance hearings in the Disputes Tribunals, but not once a matter is on appeal to the District Court. Following submissions on the consultation draft, we have included the Children, Young Persons, and Their Families Act 1989 in the list of specified statutes, because this is the enabling statute for the Youth Court jurisdiction. We consider that it should not be possible to identify, by name or other means, young persons, their schools, parents or guardians or complainants in Youth Court proceedings, to ensure the protection of children and young people involved in such cases.³³⁸
- 5.37 At present, rule 427 of the Family Courts Rules 2002 provides that parties to proceedings and their lawyers, and also persons who satisfy the registrar that they have a proper interest in the proceedings, may search, inspect or copy court records.³³⁹ This is not inconsistent with rule 69(8) of the District Courts Rules 1992,³⁴⁰ even though the records of most Family Court proceedings are presumptively closed. In our view, in some circumstances people should continue to be able to access these records with leave, for example, where there is a public interest such as ensuring accurate reporting or for bona fide research.

337 The Guardianship Act 1968 has been replaced by the Care of Children Act 2004. The Matrimonial Property Act 1963 was repealed by the Property (Relationships) Act 1976.

338 We also consider that access to records of family group conferences in the Youth Court jurisdiction should be restricted.

339 Certain other persons may also do so in proceedings relating to the Children, Young Persons, and Their Families Act 1989. Access is subject to court orders, directions or other special reasons: Family Courts Rules 2002, r 428–429.

340 Rule 69(8) allows a registrar to grant any person leave to search, inspect or copy any file or document even though prohibited by the earlier rule 69(4) relating to the Family Court statutes, and mandates such leave (subject to directions of a judge) where the person has a genuine or proper interest.

5.38 In deciding whether the reason for withholding is outweighed by a public interest in disclosure, the following factors may be relevant:³⁴¹

- how any children or other particularly vulnerable people will be affected;
- whether particular circumstances of a family or person need be disclosed;
- whether identification is likely even if names are deleted;
- whether the matter is one of genuine public interest;
- whether the issue or case has been discussed in the media.

5.39 It may be that the concerns that would justify withholding the information can be met in particular cases by redacting personal information and any means of identification from the material before it is made available.

Defamation

5.40 The High Court Rules currently restrict access to court records in proceedings for defamation, seduction, enticement and breach of promise. The last three actions were all abolished by the Domestic Actions Act 1975, and should not continue as grounds for restriction of files. However, we consider that the restriction in proceedings for defamation should continue as an exception.

5.41 One argument in support of the restriction is that it reflects the special character of defamation proceedings, and ensures that, generally, pleadings are filed, considered by the court and, where necessary, struck out, modified or suppressed before there can be any publication of the content of the pleadings. Defamation involves presumptively false statements that unjustifiably harm reputation. The rule operates as a protection of the reputation of the plaintiff, reflecting the nature of the injury involved in defamation. The plaintiff has to plead the exact words that create the alleged injury. The defendant may go on to specify allegations of bad reputation in reduction of any liability for damages, which may involve a further attack on the character of the plaintiff.

5.42 On the other hand, it can be argued that defamation proceedings are rare, usually involve high-profile people, the content of the defamation is often widely known, and may involve matters of public interest. It may also be seen as inconsistent to have a restriction for defamation cases, but not for cases involving a breach of confidence, malicious falsehood or breach of privacy. However, these cases could be protected from the presumption of accessibility where necessary under the grounds for withholding, on a case-by-case basis.

5.43 We have concluded on balance that the defamation exception should be continued, although it should not be a conclusive reason to withhold; it can be outweighed by other public interest considerations.

Property disputes arising out of agreements to marry

5.44 The District Courts Rules also restrict searches of files relating to property disputes arising out of agreements to marry. While this restriction should continue to apply to allow for those cases where children or vulnerable adults

341 Compare factors suggested as influencing a court to permit publication in a Family Court case: *K v M* [2005] NZFLR 346, Judge VH Ullrich. But access by leave of a judge (not a registrar) should be allowed.

are involved, in principle, it is difficult to see why in other cases the information should be withheld. Again, this reason can be outweighed by other considerations in the public interest and the information might be released by a judge on application.

Privacy

- 5.45 Good reason for withholding information may exist if it is necessary to protect the privacy of natural persons. This is not a conclusive reason to withhold – it may be outweighed by other considerations in the public interest.
- 5.46 Privacy also appears in the Official Information Act 1982 as a reason for withholding information. The provision extends to protect the privacy of deceased natural persons.³⁴² Examples of cases in which this part of the provision has been considered by the Office of the Ombudsmen include adopted adult children seeking information about their deceased birth mothers,³⁴³ a widow seeking details of her late husband’s criminal convictions,³⁴⁴ and a request by family members for the psychiatric records of a deceased sister.³⁴⁵ In these cases, part or all of the information sought was eventually released.
- 5.47 The Office of the Ombudsmen has indicated that the key issue under the Official Information Act 1982 is to determine whether or not it is *necessary* to withhold the information in order to protect an individual’s privacy. In making this determination, factors to be taken into account are:
- the nature of the information that would be disclosed;
 - the circumstances in which the information was obtained and held;
 - the likelihood of the information being information that the person concerned would not wish to be disclosed without consent;
 - the current relevance of the information; and
 - the extent to which the information at issue has already been made public.³⁴⁶
- 5.48 We consider that similar factors are relevant in determining the weight to be accorded to privacy in the formulation of court rules for accessing court records. We had not originally proposed that this should extend to the privacy of the deceased in the context of court records, but the Privacy Commissioner noted that this would be inconsistent with the protection provided by the Privacy Act 1993.³⁴⁷ For consistency with the Privacy Act 1993 and the Official Information Act 1982, we include privacy of the deceased as a reason for withholding, but we expect that the privacy of the deceased would weigh less heavily against the countervailing public interest in disclosure as time passes.³⁴⁸

342 Official Information Act 1982, s 9(2)(a).

343 *Case No. A6553, A6580, A6722*, 12th Compendium of Case Notes of the Ombudsman, 89

344 *Case No. W41406*, 12th Compendium of Case Notes of the Ombudsman, 93.

345 *Case No. W42031*, 12th Compendium of Case Notes of the Ombudsman, 97.

346 *Case No. W41406*, 12th Compendium of Case Notes of the Ombudsman, 94. See also Office of the Ombudsmen *Practice Guidelines – Official Information* (Wellington, 2002) Part B, ch 4.1.

347 Privacy Act 1993, s 29.

348 This view is expressed by I Eagles, M Taggart and G Liddell *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) 283.

Contrary to court order

- 5.49 In some cases, courts specifically order that a certain part of the record not be accessed, or not be accessed without leave. But there are other kinds of court order that might also constitute a good reason for withholding some part of the record. For example, there could be a confession that has been ruled inadmissible because of non-compliance with the New Zealand Bill of Rights Act 1990, or an order suppressing part of the evidence or the name of a witness or party. In the latter situation, it may be possible to redact names and grant leave for access. Similarly, if a case is heard in private to protect confidentiality, access should only be granted (if at all) with leave.

Other reasons

RECOMMENDATION

- R12 The Court Information Act should also provide that information may be withheld if:
- (a) the making available of the information requested would be contrary to the provisions of a specified enactment; or
 - (b) the information requested is or will soon be publicly available;³⁴⁹ or
 - (c) the information requested cannot be made available without substantial collation or research; or
 - (d) the request is frivolous or vexatious, or the information requested is trivial.

- 5.50 One enactment that is relevant is the Criminal Records (Clean Slate) Act 2004. Where this Act applies, information held on a court record should be withheld (subject to a number of exceptions set out in the Act).

TIME PERIODS TO BE CONSIDERED IN FORMULATION OF RULES

- 5.51 Whether good reason for withholding information will exist in a particular case may depend on the stage the proceedings are at. To take an obvious example, the risk of prejudice to a fair trial is unlikely to be a reason to withhold information once the trial is over, but it is much more likely to be relevant in the pre-hearing period. The rules relating to access should reflect any relevant differences in the stage of the proceedings; that is in relation to some material, different rules of access may apply before, during, or after the hearing.

RECOMMENDATION

> Continued next page

- R 13 There are four periods in the life of a proceeding that are relevant for the purposes of access to court records:
- Period 1: pre-hearing (from the commencement of the proceedings until the commencement of the substantive hearing).

349 Under the Official Information Act 1982 this section has been said to apply to situations where it is “administratively impractical” for the information to be released, for example, because it is at the printers. The delay in release should be short and certain – Office of the Ombudsmen *Practice Guidelines* – *Official Information*, above n 346, ch 2, 7.

RECOMMENDATION

- Period 2: during hearing (from the commencement of the substantive hearing until 28 days after the end of the proceedings).³⁵⁰
- Period 3: post-hearing (from 28 days after the end of the proceedings) to transfer to Archives New Zealand.
- Period 4: after court records are transferred to Archives New Zealand.

- 5.52 Period 1 is intended to include any pre-trial or interlocutory hearings. On occasions, a pre-trial hearing will dispose of a matter, and there may be no subsequent “substantive hearing”, by which we mean a court hearing of the substantive subject matter of the proceeding, complete with witnesses and argument. During consultation, the Criminal Practice Committee asked what would amount to a substantive hearing – would it, for example, include a successful application under section 347 of the Crimes Act 1961 for the discharge of the accused? In the civil context, a similar example would be where, as a result of an interlocutory application, a proceeding is struck out.
- 5.53 In such situations, the matter will be resolved without the need for a “substantive hearing”, but this will not be apparent until the pre-trial application has been heard by the court. Until that time, in our view, the matter should be treated as being in Period 1. Once the pre-trial application has been decided, if it disposes of the proceeding, then in the case of any application for access to the court record, the matter will fall into Period 3, the period after the end of the proceedings.
- 5.54 In the consultation draft, Period 3 finished seven years after the end of the proceedings. However, the access regime recommended in that period in the consultation draft was the same for the beginning of Period 4: no change in the regime occurred until the court records were sent to Archives New Zealand. Accordingly, we have changed the division of the time periods to more accurately reflect our recommendations, by continuing Period 3 until transfer of court records to Archives New Zealand.

CONTENT OF THE RULES

- 5.55 As indicated, the application of the Court Information Act to court records will be implemented by rules of court. We are not attempting to draft those detailed rules in this report, but in this section we discuss what we consider their substantive effect should be in relation to particular documents held on court records. In some respects, the result of the application of the principles set out in the Act differs according to the time in the proceeding at which a request for access is made, so the following discussion reflects those four time periods.

³⁵⁰ At the suggestion of the Criminal Practice Committee, we have adopted the phrase “end of proceedings”, which appears in the Victims’ Rights Act 2002. The end of the proceedings in criminal cases is the date of disposal of all appeals against conviction or sentence or both in relation to all accused and counts to which the file of record relates, and if there are no rights of appeal, the date on which proceedings relating to the offence or offences are otherwise finally determined – Victims’ Rights Act 2002, s 24(2). In civil proceedings, the end of proceedings will be the date of disposal of all appeals, or the date of expiry of any appeal period, or if there is no right of appeal, the date on which proceedings are otherwise finally determined.

5.56 Where leave is required in any request for material held on a court record, the presumption and exceptions set out in the Act provide the framework against which the judge should decide whether to grant leave; that is, the information should be made available unless one of the listed reasons for withholding exists, and, unless the reason is a conclusive one, an assessment must be made as to whether other considerations render it desirable in the public interest to make the information available.

Search, inspect and copy

5.57 A number of the current rules refer to entitlement to search, inspect and copy court records.³⁵¹ We recommend that expression continue to be used in the new rules. In the following discussion, where we refer to “access” to court records, we mean the right to search, inspect and copy.

Notice to the parties

5.58 In their comments on the consultation draft, the Chief Justice, the District Court judges and the NZLS expressed the view that where a non-party seeks access to a court record, notice to the parties should be required. The NZLS considered that this requirement was only necessary until the hearing was concluded, but the Chief Justice considered that all applications for access should be on notice until court records were transferred to Archives New Zealand, which she considered should be after 60 years.

5.59 The current rules of court do not expressly require notice to be given where application is made for access to court records, but, in practice, judges and registrars often give the parties an opportunity to be heard. In the Supreme Court’s decision in *Mafart and Prieur v Television New Zealand Ltd*,³⁵² Justice Tipping noted:

Although applications under the Criminal Search Rules may be made informally, the judicial officer who determines them must be careful to ensure that any person who might be detrimentally affected is given an opportunity to be heard ...

5.60 In civil cases, where leave of a registrar is required for access to records (for example, before the proceedings are determined), it has been suggested that the registrar should allow submissions from the parties.³⁵³

5.61 While we agree that there will often be occasions where the views of the parties will be highly relevant to an application for access, we are reluctant to impose a requirement in the rules that applications be made on notice. The risk is that this will greatly increase the formality of applications, and the time involved in hearing them. The NZLS supports the idea that applications should be informal,

351 See for example High Court Rules, r 66, and the Criminal Proceedings (Search of Court Records) Rules 1974 (which refer to an entitlement to copy or be issued with a copy). Rule 427 of the Family Courts Rules 2002 uses the expression “search, inspect and copy” in the titles to the rules, but, for example, r 427(2) refers only to the right to search the records.

352 *Mafart and Prieur v Television New Zealand Ltd* [2006] NZSC 33, para 43.

353 *Young v Ross* (1999)13 PRNZ 401. If an application is made for directions under r 66(7) of the High Court rules the parties to the proceeding should normally be given the opportunity to make submissions – *Re Fourth Estate Periodicals* (1989) 3 PRNZ 189.

but if there is a regulatory requirement for notice, it is difficult to see how this informality can be maintained.

- 5.62 With respect, in our view, requiring notice to the parties for up to 60 years in relation to an application for access will frequently be an insurmountable barrier to a successful application, because the chances of locating a party long after the hearing will greatly decrease.
- 5.63 We do not recommend that notice to the parties be a requirement set out in the new rules. Where leave is required to access a court record, it should be a matter for the discretion of the judge as to whether notice should be given to the parties. Once a hearing is concluded, in our view, notice would only be required in exceptional circumstances.

Genuine and proper interest

- 5.64 Many of the present rules refer to a category of requester who can obtain information if the registrar or judge is satisfied that he or she has a “genuine or proper interest” in obtaining it.³⁵⁴ We do not recommend this distinction be continued in the new rules regime, and we did not receive any submissions that supported maintaining the distinction. While we accept that in some situations the status of the requester can be relevant, the current presumption and exceptions should enable most requesters who have a genuine or proper interest to obtain the information they seek. The presumption that the information is accessible means that the onus will not generally be on the requester to argue for access.
- 5.65 Even if there are reasons for withholding the information requested, unless these are conclusive reasons, they may be outweighed by factors that make it desirable in the public interest, for the information to be accessible. In individual cases, this may allow a judge to take into account the specific requester and his or her interest. For example, if the requester is a journalist investigating alleged abuses regarding in-patient orders relating to mental health proceedings, a significant public interest could be argued, and the information should be available subject to redaction of identifying details. Researchers will have specific procedures for accessing court records that will mostly override reasons for withholding information in the public interest.

Who should be the decision maker?

- 5.66 Presently, registrars make many of the decisions on access to court records, and under the civil rules have a broad discretion to grant leave to search files that are otherwise unavailable to the public. The new regime continues a requirement for leave in many cases, which means a decision maker will need to consider the application.
- 5.67 In the consultation draft, we had proposed that registrars should be able to grant leave to search records under the new rules. One of the reasons for this was to try to avoid adding to the work load of judges. However, during consultation, the District Court judges expressed concern about this general proposition. They noted that, as a result of many years of changing court structures, there

³⁵⁴ See for example High Court Rules, r 66(9); Family Courts Rules 2002, r 427.

has been an increase in the number of court managers appointed with the powers of registrars, who have management experience in other fields, but little or no practical court experience. The judges were concerned at the prospect of registrars without sufficient experience being asked to make decisions about the release of information that requires a balancing of interests.

- 5.68 Other judges confirmed the need for leave to be given by a judge rather than a registrar, noting that it will be important for the decision maker in many cases to understand the background to the case and to have read the file. The District Court judges were not unduly concerned about access requests creating an increase in their workload. They suggested that, if it became an issue, a system of delegation to particular registrars might be workable.

RECOMMENDATION

R14 Where leave is required under the rules to access any court record, it should be leave of a judge.

Matters that will always require leave for public access

Sensitive material

- 5.69 There will often be material held on criminal and civil case files that contains very personal or private information. Examples include:
- medical, psychological and psychiatric reports;
 - victim impact reports;
 - pre-sentence reports;
 - probation reports and social workers' reports;
 - papers relating to the criminal responsibility of mentally impaired persons;
 - any material that identifies complainants and others innocently connected with sexual offending;
 - any information provided to the court on a confidential basis;³⁵⁵
 - any evidence for which a suppression order is in force, or that is the subject of an application for such an order.
- 5.70 In our view, there are a number of good reasons that rebut the underlying presumption of accessibility in relation to this kind of material (sensitive material), at least as far as public access is concerned,³⁵⁶ except to the extent that the information is referred to by a judge in open court. Reasons for withholding this information include privacy, the risk of endangering the safety of a person, or statutory provisions such as those set out in the Victims' Rights Act 2002.³⁵⁷

355 This could be material placed in a sealed envelope and marked to the effect, "Not to be opened except by order of a judge". Such information might include details of a defendant's actions assisting the Police with other inquiries, or relating to paid informers.

356 Approved researchers may sometimes be granted access to such material pursuant to a privileged access agreement but would be bound to anonymise all personal identifiers.

357 For example, the judge may withhold any part of a victim impact statement if, in the judicial officer's opinion, withholding the part is necessary to protect the physical safety or security of the victim concerned – Victims' Rights Act 2002, s 25.

5.71 There are sound reasons for withholding pre-sentence and probation reports from non-party access. They will contain private and sensitive material, and making them more widely accessible might prejudice the proper administration of justice. If it were known that such reports would be publicly available, defendants and their families would be less likely to cooperate openly with the Probation Service in preparing them. Such material should not be accessible to the public without leave of a judge, and, even then, it is likely that there will usually be good reason to deny leave.

Specified statutes

5.72 We consider that public access to court records of proceedings under any of the specified statutes listed in Recommendation 11(c) should continue to be available only with leave during the four periods of the life of the record until 60 years after filing.

Juries

5.73 Lists of names of jurors for specific trials are kept on the case file. The recent practice is to record the names of jurors on a separate sheet of paper, and not to record them in the Crown Book,³⁵⁸ but we understand that some courts still continue the former practice of writing the names of jurors on the indictment and writing them in the Crown Book.

5.74 As discussed in chapter 3, the Criminal Procedure Bill 2004 proposes changes to the Juries Act 1981, for example, by providing that jury lists may not be left in the possession of the defendant, any witnesses or victims.³⁵⁹ Where jury lists are kept on a case file, they should only be available subject to the provisions of the Juries Act 1981. We endorse the practice of keeping the jury lists separate from the Crown Book and the indictment, and suggest it should be uniform throughout the country.

ACCESS DURING THE FOUR PERIODS

Period 1: Pre-hearing (from the commencement of the proceedings until the commencement of the substantive hearing)

Access by the parties

RECOMMENDATION

R15 Subject to statute and court order, in the pre-trial period, parties and their counsel should be entitled to access all material on the court record without leave.

5.75 In the normal course, in most civil and criminal proceedings, parties and their counsel should be entitled to access to all material on the court record.

5.76 At present in the Family Court, the registrar retains an overriding discretion to withhold a document from search if he or she considers that there is some special

³⁵⁸ Email correspondence with Justice Williams, High Court, Auckland, 16 May 2006.

³⁵⁹ Criminal Procedure Bill 2004, Part 4, cl 74.

reason why the person should not search the document.³⁶⁰ It may be appropriate to carry this provision through to the new rules relating to access to Family Court records, given the sensitive and personal material that can be held on Family Court files, and the possibility that, in extreme cases, revealing certain information may carry a risk of endangering a person's safety.

- 5.77 In criminal cases, where there is more than one defendant in a criminal trial the rules presently require leave of a judge for access to the court file. (Where there is only one defendant, no leave is required.) The Chief Justice suggests it would be sufficient to rely on a court order restricting access in appropriate cases, rather than maintaining the present rule. We agree, and do not recommend the continuation of this requirement under the new rules.

Access by the public

RECOMMENDATION

- R16 Subject to statute and court order, in the pre-trial period, non-parties should be entitled to access without leave:
- registers and indexes of proceedings;
 - any document where a right of search or inspection is given by any Act, or where the document constitutes notice of its contents to the public;
 - informations (after the first call) and indictments;
 - notices of proceeding and pleadings (after the first case conference);
 - interlocutory or pre-trial orders or decisions.

- 5.78 A category of information should be available to non-parties without leave in the pre-hearing period. Subject to statute or court order, all registers and indexes of proceedings,³⁶¹ and any document where a right of search or inspection is given by any Act, or where the document constitutes notice of its contents to the public, should be accessible to the public.
- 5.79 Should this category be widened to make other initiating documents available to the public without leave in the pre-trial period, such as pleadings in civil proceedings, and informations and indictments in criminal proceedings? The arguments for and against public access to these documents are finely balanced. Public access to these initiating documents is not currently available without leave of a judge in the pre-trial period.

Informations and indictments

- 5.80 Informations can contain allegations that may be withdrawn by the time the matter comes to trial. Requiring leave for non-party access to these documents would give the court an opportunity to consider whether any suppression issues

³⁶⁰ Family Courts Rules 2002, r 428(2).

³⁶¹ But the requestor must specify a name in criminal cases, consistent with the Criminal Records (Clean Slate) Act 2004.

arise, and, in our consultation draft, we recommended that leave should be required for this reason.³⁶²

- 5.81 On the other hand, informations and indictments are at present routinely made available to the media in court. In consultation, the District Court judges took the view that informations and indictments are the founding document in a criminal proceeding, and that there is no reason why they should not be available to the public, subject to issues of suppression or other court order. They suggested making them available as of right after the matter has been called for the first time. This would give the court the opportunity to put in place any orders where suppression is an issue. We have changed our recommendation accordingly.
- 5.82 We note that if jury details have been recorded on the indictment, it will not be appropriate to allow access to the original. In this situation, a copy of the original indictment, minus jury details, should be made available. Where the recent practice of keeping jury details separate from the indictment has been followed, this situation will not arise.

Pleadings

- 5.83 In civil proceedings, the chief argument against making pleadings available before the hearing is that they contain untested allegations, some of which may be subsequently withdrawn or struck out. Early release of the pleadings may give an unbalanced picture of the proceedings, particularly if a statement of defence has not yet been filed to counterbalance the allegations. A number of cases warn of the risk of “trial by media” resulting from pleadings being disclosed prematurely.
- 5.84 As well as issues of untested allegations and lack of balance, there may be concerns about sensitivity of material contained in pleadings, such as breach of confidence cases, or a proceeding arising out of very private circumstances, like a gender reassignment. Even if the facts are alluded to only briefly in the documents, they will be sensitive nonetheless.
- 5.85 On the other hand, improved access to court documents may lead to improved reporting by the media. A media organisation will not always be able to have a representative in attendance for the duration of every court proceeding, and even if a reporter is present in court, given the increasing reliance by counsel and judges on written material, the reporter may still be hard pressed to understand and accurately report the proceedings without access to the pleadings at least. Further, in a civil matter, one party may make documents available to the media, giving a one-sided view of proceedings.
- 5.86 While sensitive matters may be set out in pleadings, they do contain only a summary of the material facts, rather than long passages of evidence.

362 We noted that Queensland and Victoria adopt a more cautious approach to access to initiating documents in criminal cases than to the equivalent documents in civil cases. In Queensland in criminal proceedings, on payment of a fee a person may search for or inspect a court file or document other than an exhibit or indictment, and may obtain a certified copy of details noted on an indictment, unless there is a court order restricting access to the file, or a court officer considers giving the details may put a person’s safety at risk – Criminal Practice Rules 1999 (Qld) s 57. In Victoria, a document filed in a criminal proceeding in the Supreme Court is not open for inspection unless the Court or the relevant officer of the Court so directs – Supreme Court (Criminal Procedure) Rules 1998 (Vic) r 1.11(4).

There is less risk of their containing scurrilous and damaging material than other documents on the file, such as affidavits. In practice, at present the pleadings are often made available to the media by the registrar, without trial by media resulting.

- 5.87 In a number of Australian jurisdictions, pleadings are more accessible by the public than in New Zealand, subject to court order. In Queensland, in the Supreme and District Courts, all civil files and documents are accessible to the public on payment of prescribed fees. There is no vetting of pleadings in any way by the registry before they are released. If a party wishes to limit access to its pleadings, it may apply to the court for an order, but apparently such applications are rare. The Principal Registrar of the Supreme Court advises that public access to files and documents does not cause any problems to future hearings.³⁶³
- 5.88 However, other Australian courts have adopted a practice of a judge or registrar viewing requested material first and making a decision about access.³⁶⁴ Effectively, this allows the court to exercise control over any material that in its view ought not to be released.
- 5.89 In the consultation draft, we expressed the view that the arguments were finely balanced, and that, given the risk of sensitive material being disclosed in some pleadings, generally they should not be available to the public without leave. However, we consider that, consistent with our recommendations in relation to informations and indictments, this requirement for leave should only operate until the first case conference. At that time, a statement of defence will have been filed to counter the allegations made, and the parties will have the opportunity to raise any issues of concern about release of the pleadings with the judge. If necessary, a judge can order that the pleadings only be made available to the public with leave. In the absence of such an order, pleadings should be available to the public without leave. We note that this does not apply to proceedings under the statutes listed at Recommendation 11(c): access to these pleadings by non-parties will require leave.

Hand-up depositions and other pre-trial documents

- 5.90 In criminal proceedings, access to material such as hand-up depositions at preliminary hearings should not be restricted without good reason. Presently, depositions are often handed up for reasons of convenience, rather than confidentiality. Such material should be made available on request, and should only be withheld if the content of the deposition actually requires it. Our recommendations in this regard are discussed in detail in chapter 7 (Media Access).

363 Correspondence from Principal Registrar Queensland Supreme Court, 21 March 2006.

364 Correspondence with Anne Wallace, Australian Institute of Judicial Administration, 16 March 2006. In the Supreme Court of the Northern Territory, a Practice Direction governing access to the court file in civil cases provides that any inspection of a court file is subject to the discretion of the court registrar or master. Subject to that, there is a general right of access to pleadings: Public access to civil jurisdiction court files, Practice Direction No. 13 Of 2001 at www.nt.gov.au (last accessed 21 March 2006). In Victoria, the principal registrar has an overriding discretion to decide that material should remain confidential to the parties – Supreme Court (General Civil Procedure) Rules 1996 (Vic).

- 5.91 Bail documentation should be available to the parties without leave in the pre-hearing period, but leave should be required for access by non-parties, because there may be good reasons to withhold such material from them in this period.
- 5.92 There may be other pre-trial applications, such as applications for orders as to admissibility of evidence. Documents relating to such applications should be accessible by the parties without leave being required, but for non-parties, in the pre-trial period, there may be good reason to withhold the material, so leave should be required.

Civil proceedings – interlocutories

- 5.93 Chambers³⁶⁵ hearings take place in private. However, details of the hearing and the judgment may be reported.³⁶⁶ In the High Court, interlocutory matters are heard in chambers unless the Court orders otherwise.³⁶⁷ The modern justification for the practice of hearing matters in chambers was said by Lord Woolf MR in *Hodgson v Imperial Tobacco*³⁶⁸ to be that such hearings:

... make an important contribution to the administration of justice. They allow issues to be determined informally and expeditiously. They allow less strict rules as to representation to apply. They allow matters to be discussed which the parties might not wish to discuss in open court. They encourage openness. They are less intimidating to litigants.

- 5.94 The practice has long been the subject of criticism.³⁶⁹ Given the importance ascribed to the open justice principle, it could be questioned whether the matters set out by Lord Woolf are sufficient to displace it. Indeed, in delivering the judgment of the court, Lord Woolf ultimately held that, on request, permission should be granted to members of the public to attend chambers hearings, “to the extent that this is practical”.³⁷⁰
- 5.95 The Law Commission has previously recommended that, where practicable, the public should have access to routine civil procedural matters that are currently heard “in chambers”.³⁷¹ Some matters are heard in chambers because of the sensitivity that attaches to the material – ex parte injunctions, particularly involving orders for the preservation of property or seizure of assets, are examples. But many interlocutory matters do not involve such interests.

365 The meaning of the term “chambers” depends upon the context in which it is used. It can mean a judge’s private rooms; it may also mean a type of jurisdiction (see *Profcom Systems Ltd v Madison Advertising Ltd* (1988) 1 PRNZ 662 (HC)).

366 High Court Rules, r 72A.

367 High Court Rules, r 251(2). The District Court judges advise that most interlocutory matters in the District Court are heard in open court.

368 *Hodgson v Imperial Tobacco* [1998] 2 All ER 673, 686 (CA).

369 As early as the seventeenth century Sir Edward Coke said: “The judges are not judges of chambers but of courts, and therefore in open court, where parties’ counsel and attorneys attend, ought orders, rules, awards, and judgments to be made and given, and not in chambers and other private places”. (Cited in *Medical Board of Victoria v Meyer* (1937) 58 CLR 62, 94 (HCA) Dixon J.)

370 *Hodgson v Imperial Tobacco*, above n 368.

371 New Zealand Law Commission *Delivering Justice for All* (NZLC R85, Wellington, 2004) 320.

- 5.96 Leave is presently required for non-parties to search court records in interlocutory matters before the proceeding is determined. Both the District Courts and High Court Rules have been clarified to make it clear that the proceeding which must have been determined is the substantive proceeding, not the interlocutory application.³⁷²
- 5.97 As well as operating to protect information in proceedings that really require the privacy of a chambers hearing, the rule reflects a concern about allegations and material that may subsequently be withdrawn being accessible prematurely. Interlocutory applications are often supported by affidavit evidence, increasing the risk of their containing untested allegations.
- 5.98 On the other hand, interlocutory proceedings can decide very significant matters, sometimes even effectively determining the proceedings themselves, and they can be very difficult to understand without access to the papers. It seems inconsistent to allow the publication of reports of interlocutory proceedings, without allowing access to the documents relating to the proceedings.
- 5.99 We consider that, in the pre-hearing period, a decision of a judge should be required as to whether there is good reason to withhold interlocutory proceedings from non-parties. In many cases that are heard in chambers only for reasons of convenience, no good reason will exist, and the information should be released.
- 5.100 Subject to any confidentiality orders, interlocutory orders or decisions should be available to non-parties without leave.

Period 2: During the hearing (from the commencement of the substantive hearing until 28 days after the end of the proceedings)

Civil proceedings

RECOMMENDATION

- R17 During the hearing, subject to statute or court order, parties in civil cases should be entitled to access all information on the case file without leave. Subject to statute or court order non-parties should be able to access the following information without leave:
- indexes and registers;
 - any information if a right of search or inspection is given by any Act, or where a document constitutes notice of its contents to the public;
 - notices of proceeding;
 - pleadings;
 - written material that records what was said or done in open court;
 - information that could have been heard or seen by any person present in open court;
 - submissions of counsel (where provided);
 - transcripts of evidence;
 - orders, minutes, judgments and reasons for judgments, once given.

³⁷² High Court Rules, r 66(3A), District Courts Rules, r 69 (3A).

5.101 At present in civil proceedings, material held on the court file is not available to the public without leave unless the proceeding has been determined. This rule has been described by the courts as being intended to preserve a climate of opinion in which justice can be administered. However, most proceedings are open to the public, and the media are entitled, in most cases, to attend during the hearing and report information as it is produced in court. Accuracy of reporting will often be enhanced by access to documents on the court file – indeed, in some civil matters it can be hard to understand the proceedings without access to the pleadings.

Written material

5.102 In the United Kingdom, the courts have taken the view that, as a matter of basic principle, practices adopted by the courts and parties to ensure the efficient resolution of litigation should not be allowed to adversely affect the ability of the public to know what is happening in the course of the proceedings.³⁷³ We consider that the same fundamental principle should apply in New Zealand.³⁷⁴

5.103 The Supreme Court of New South Wales described the issue in the following terms:³⁷⁵

The modern practice of affidavits not being read aloud in court but formally read and dealt with ... is adopted to save the time of the court, the public purse and the funds of litigants, and not for the purpose of removing from public hearing and scrutiny the affidavit material which would formerly have been read aloud in court and available to that scrutiny. It is in my view of particular importance that it not be allowed to have that effect by a side wind.

Similar considerations should apply to evidence given in proceedings by the use of written statements.

5.104 There will be some written information that will be withdrawn or struck out prior to hearing, or that is handed up and not read aloud because of its sensitivity. In those situations, there will be good reason for the court to withhold the information. We note too that in *Hammond v Scheinberg*, the court refused to treat as accessible by the public exhibit evidence contained in bundles of documents, preferring instead to admit the bundle of documents into evidence provisionally, with leave reserved to the parties to object to particular documents being in the bundle right up to the close of evidence.³⁷⁶

373 *Barings plc (in liq) v Coopers & Lybrand* [2000] 3 All ER 910, 919–920, per Lord Woolf MR.

374 In New Zealand it has been suggested that it may be arguable as to whether counsel's written submissions are technically part of the court file: *L v Police* (2000) 17 CRNZ 257, para 35. The Court considered, however, that written submissions lodged with the Court were within the Court's control and therefore subject to the Court's discretion to search.

375 *Hammond v Scheinberg* (2001) 52 NSWLR 49, 54.

376 *Hammond v Scheinberg*, above n 375. This practice was adopted to save time being taken up in objections early in the trial which may have disappeared by later in the trial. As documents may be removed from the bundle, or made subject to confidentiality orders, the judge did not see it as appropriate that those documents should be made available to the media during the hearing.

RECOMMENDATION

- R18 During the hearing, subject to statute or court order, parties should be entitled to access all information on the case file. Subject to statute and court orders, non-parties should be able to access the following material without leave:
- indexes and registers;
 - informations;
 - indictments;
 - any information if a right of search or inspection is given by any Act, or where a document constitutes notice of its contents to the public;
 - written material that records what was said or done in open court;
 - information that could have been heard or seen by any person present in open court;
 - submissions of counsel (where provided);
 - transcripts of evidence;
 - orders, minutes, judgments and reasons for judgments, once given.

5.105 Where a person’s criminal conviction list is held on a case file, it should not be available to non-parties until after verdict, in the interests of a fair trial and the presumption of innocence, and then only with leave.

Period 3: Post hearing (from 28 days after the end of the proceedings) to transfer to Archives New Zealand

RECOMMENDATION

- R19 After the proceedings, until the court record is transferred to Archives New Zealand, leave should be required for non-parties to access sensitive material, or court records of proceedings under the statutes specified in Recommendation 11(c). Subject to statute and court order, other court records should be available without leave.

5.106 At present, the civil rules recognise a continuing interest in allowing access to information from court proceedings for a significant period after the end of the hearing, creating a general right of access to civil case files for six years after the determination of the proceeding. In criminal cases, however, leave of a judge is required post hearing not only for public access to criminal files, but also for the parties to access them.³⁷⁷

³⁷⁷ The rights of the parties to access to the court file without leave only lasts until the end of the hearing and any appeal period, according to the Court of Appeal in *R v Greer* (4 June 2003), CA197/01, Glazebrook, Hammond and O’Regan JJ.

- 5.107 In our view, the presumption in criminal cases in the period immediately following completion of all appeals, up to seven years, should be the same as currently applies to civil cases, namely accessibility, with exceptions to allow for court orders and sensitive material as appropriate. Parties to a criminal proceeding should continue to have greater rights of access to material on the court record than the public, even after the proceeding is completed.
- 5.108 This view is consistent with the rules drafted by the Criminal Practice Committee in 2004, which provided for much greater access to criminal files in the post-hearing period than is presently allowed under the rules.
- 5.109 After seven years in certain criminal cases, the Criminal Records (Clean Slate) Act 2004 will be a relevant consideration in terms of access to records. Some case files that might otherwise have been accessible will need to be withheld after this time.
- 5.110 For other criminal case files, the exceptions discussed above under Period 2 for sensitive material, sentencing reports and so on should continue after the hearing until the record is either destroyed or sent to Archives New Zealand, as should any statutory or court-ordered restrictions on access. Other material should be available without leave: at the close of a proceeding, parties, counsel and the court can ensure that any appropriate orders are made restricting access to material on the file where withholding is justified.
- 5.111 In civil cases, under the current rules after six years people require leave to access court records (with the exception of registers, indexes and certain public documents). In the recent decision in *Mafart and Prieur v Television New Zealand Ltd*,³⁷⁸ the Supreme Court suggested that the six-year period of openness was perhaps to accommodate related litigation, with the more restricted access to files between six and 60 years possibly reflecting a concern for the privacy of parties and witnesses.
- 5.112 In our view, during this post-hearing period, until the file is transferred to Archives New Zealand, leave should still be required to access records of civil proceedings under the statutes specified in Recommendation 11(c), except appeals from the Disputes Tribunals, which should be treated in the same way as ordinary civil proceedings in the District Court. Leave should also be required to access sensitive material on civil files during this same period. Any statutory or court-ordered restrictions will also continue in place. Other material should be available without leave.
- 5.113 We note that many court records will be destroyed during Period 3 under destruction schedules agreed between the Ministry of Justice and Archives New Zealand. These schedules are discussed further in chapter 9. Essentially, a large number of civil and criminal records do not need to be retained beyond 10 years.

³⁷⁸ *Mafart and Prieur v Television New Zealand Ltd*, above n 352, para 26.

Period 4: After court records are transferred to Archives New Zealand

RECOMMENDATION

R20 On transfer to Archives New Zealand, where access to court records is limited by statute, the court record should be classified as a restricted record. Where access to court records is limited by court order, or where the record relates to proceedings under a statute listed in Recommendation 11(c), the court record should be classified as a restricted record, with the restriction to lapse when the court record is 60 years old. Sensitive material (such as medical reports, pre-sentence reports, or information relating to victims and minors) on a court record should be classified as restricted, with the restriction to lapse when the court record is 60 years old.

5.114 The Public Records Act 2005 applies to courts and court records. The Act is discussed in more detail in chapter 9. Public records that have been in existence for 25 years must be transferred to the possession of Archives New Zealand, and the control of the Chief Archivist.³⁷⁹ Not all court records are transferred to Archives New Zealand by any means: there are agreed destruction schedules in place that allow many court files to be destroyed after 10 years.

5.115 The “administrative head” of the public office that controls the public record in question must make access classifications for all records that have not been destroyed, when they are 25 years or older, or when they are about to be transferred to the control of the Chief Archivist.³⁸⁰ Records will be either open access or restricted access.

5.116 At this point, neither the Ministry of Justice nor Archives New Zealand are clear as to who the administrative head is in relation to court records. In our view, classifications should be made by the Chief Justice or the Head of Bench of the court to which the records relate. It may be necessary to clarify this by including an appropriate provision to this effect in the proposed Court Information Act.

RECOMMENDATION

R21 Classifications of records to be transferred to Archives New Zealand under the Public Records Act 2005 should be made by the Chief Justice or the Head of Bench of the court to which the records relate.

5.117 If there are good reasons for restricting public access, having regard to any relevant standard or advice issued by the Chief Archivist, or where another enactment requires the public record to be withheld from public access, the administrative head must, in consultation with the Chief Archivist,

³⁷⁹ Public Records Act 2005, s 21, 22. There are exceptions to this rule: where documents are to be destroyed in accordance with the provisions of the Act, or where there is written agreement between the administrative head of the public office, and the Chief Archivist as to earlier transfer, or if transfer is deferred under the Act.

³⁸⁰ Public Records Act 2005, s 43.

determine whether it is necessary to restrict public access for a specified period of time, or to permit public access on conditions.³⁸¹

- 5.118 Unless there are good reasons to restrict public access, a public record must be classified as open access. The Act provides for free inspection of an open access record to members of the public.³⁸²
- 5.119 The civil and criminal rules presently provide that 60 years after filing, any person can search the record. There was widespread support in submissions for the present general openness of records after 60 years. We consider that this broad accessibility should continue, but until 60 years has passed, there are some court records to which access should continue to be restricted after transfer to Archives New Zealand. These restrictions should be imposed as conditions at the time of transfer, and lapse when the file is 60 years old.
- 5.120 Civil records that should be restricted on transfer to Archives New Zealand are those where access is limited by statute or by any court order, and those included in the list of specified statutes set out at Recommendation 11(c). Criminal records where restrictions should be imposed include those where access is limited by statute or court order. Sensitive material on civil and criminal records (such as medical reports, pre-sentence reports, or information relating to victims and minors) should also be restricted.
- 5.121 We note that there are some files that may need to be classified as restricted indefinitely on transfer, because of the requirements of another Act. One example would be adoption records.
- 5.122 In its submission, Archives New Zealand noted that any rules need to translate readily into access restrictions or conditions under section 44(3) of the Public Records Act 2005, and that it is not resourced to administer conditions of access that, for example, require anonymising of records. The intention of the Public Records Act is that restrictions be administered by the controlling public office for that record. Archives New Zealand would like to be consulted on the final form of the proposed rules for Period 4. We endorse this suggestion.

Criminal Records (Clean Slate) Act 2004

- 5.123 In a number of criminal cases, seven years after final disposition of the matter, the Criminal Records (Clean Slate) Act 2004 will take effect. At present, to ensure it does not breach the Act, the Ministry of Justice and Archives New Zealand no longer allow unrestricted searching of registers such as the Return of Prisoners Tried and Sentenced. Instead, requestors must provide the name of a specified individual, and court staff will check the registers and either provide a copy of the relevant entry, or, if the Criminal Records (Clean Slate) Act 2004 applies, advise that there is no information held or able to be released. Archives New Zealand currently applies a 100-year rule, recommended by the Ministry of Justice, to ensure it does not breach the terms of the Act by disclosing material about an eligible person during their lifetime.

³⁸¹ Public Records Act 2005, s 44(3).

³⁸² Public Records Act 2005, s 47. However, the Chief Archivist may charge for research, copying or other services provided in relation to a request for access to a public archive: s 59.

- 5.124 We are aware that the Act has had problematic consequences for Archives New Zealand and researchers. Registers and indexes are a useful tool for researchers, because they contain compiled information about criminal offences. It will often be impossible for researchers to specify a name when searching registers, because the research they are involved in will frequently be anonymous, and focused on offending rather than the identity of the offender.
- 5.125 The Criminal Records (Clean Slate) Act contains an exception for researchers undertaking research approved by a government department or law enforcement agency.³⁸³ There may be merit in widening this exception to include other research, such as that conducted under the auspices of a university.
- 5.126 Putting aside the issues raised for researchers, it is a matter of concern that registers and indexes, which even under the current rules should be publicly available, cannot be freely searched by the public because of concerns about the Criminal Records (Clean Slate) Act 2004. Particularly in an electronic age, there must be ways of maintaining this information that makes it possible to remove entries that offend against the provisions of that legislation, while still allowing people ready access to the majority of the information contained on them, on which the Act has no bearing. We encourage the Ministry of Justice to explore other options in this regard.

RIGHT OF APPEAL

- 5.127 As indicated in chapter 2, until recently it has been unclear as to whether there is a right of appeal from a decision refusing access to court records. While the matter has now been considered by the Supreme Court, legislation would put the issue beyond doubt.³⁸⁴ We recommend that the proposed Court Information Act include one appeal as of right in relation to a decision on access to court records, and another appeal with leave.

RECOMMENDATION

- R22 There should be one appeal as of right in relation to decisions on access to court records, and another with leave.

COURT CALENDARS

- 5.128 In consultation, journalists expressed strong support for the initiatives taken by the Supreme Court in New Zealand to put court calendars, case summaries, transcripts and judgments on-line. They suggested that if they could have access to on-line court calendars for all courts they would be able to plan in advance which cases to report, thus enabling increased and improved coverage of the courts. Members of the media reported frustration at the time and effort currently required for confirming details such as names of parties and the exact nature of the charges or claims, and what stage the case is at. Equally, such inquiries involve a lot of court staff time.
- 5.129 Calendars appear on the websites of many overseas courts. We were advised that it would not be technically difficult to do the same thing here, subject to rules

383 Criminal Records (Clean Slate) Act 2004, s 19(3)(g).

384 *Mafart and Prieur v Television New Zealand Ltd*, above n 352. While Eichelbaum J agreed there should be a right of appeal in this case, he did not consider that it was possible to determine in advance that all applications under the criminal search rules would be civil applications.

being agreed as to what information should be displayed,³⁸⁵ and how names should be displayed where suppression orders operate. There would, of course, be practical difficulties in keeping the daily lists absolutely current, particularly in the summary criminal jurisdiction of the District Court, where the information may be subject to change at short notice. However, on-line calendars are used by some overseas courts with similar high-volume criminal jurisdictions.

- 5.130 Remote access to court calendars would also be useful for the general public, allowing people to check on the progress of a case, the correct citation of parties, dates of hearing and orders or decisions, without having to physically attend at the court house. In our view, all New Zealand courts and tribunals should provide on-line access to court calendars as a first priority of e-access.
- 5.131 We do not envisage that criminal matters would be posted on the on-line court calendar on their first call, in order to allow matters such as applications for suppression orders to be dealt with before information about the case is posted on the Internet. Calendar information would be posted for the duration of the hearing of the matter. The listing would then be removed.

RECOMMENDATION

R 23 Providing on-line access to court calendars should be a resource priority for development of the electronic medium for New Zealand courts and tribunals.

RESOURCE IMPLICATIONS OF PROPOSED NEW REGIME

- 5.132 We are aware that the proposed new regime is likely to make significant demands on the Ministry of Justice's resources. The Ministry has informed us that costs would be incurred during the initial development of the legislation and rules, to implement the new processes and in the application of on-going business processes, for example, developing and testing the new definition of court records, training staff in the application of the new regime, locating and copying records and supervising access.
- 5.133 The Ministry supports the more open access regime proposed by the Law Commission, but considers that it will require additional staff properly trained to administer requests for access to records, and more resources (such as additional photocopiers, tools for handling fragile exhibits). It is not possible to say what the costs will be at this stage, but the proposed regime is building on a system that already requires resourcing access to court records, and new rules should clarify and streamline the processes. In our view, the benefits of more open access will outweigh the additional costs.

SEARCH RIGHTS SUBJECT TO OTHER LEGISLATION

- 5.134 In chapter 1 we identified a number of other Acts that confer specific rights of search on certain agencies, such as the Inland Revenue Department and the Serious Fraud Office, which might include searches of court records. We consider that such powers are appropriately conferred under other legislation and we do not propose any amendments to such legislation under the new policy framework.

³⁸⁵ Meeting with Dick Williams, National Business Advisor for CMS, Ministry of Justice, 20 July 2005. There is considerable variation between registries as to what information is displayed on the daily lists posted in courts.

Chapter 6

Court records in electronic format

- INTRODUCTION**
- 6.1 The terms of reference ask us to consider how the *format* of the court record, whether electronic, hard copy or other, affects the principles and rules upon which access to court records are determined. Are there any additional considerations for access rules when records are in electronic form?
- 6.2 The short answer is yes: where records are held in electronic form, the ease with which information can be retrieved, manipulated and transferred has significant implications, particularly for privacy, which require additional considerations for access rules. This chapter identifies the issues that may arise where court records are in electronic format, with a particular focus on documents that are available on the Internet, and suggests future approaches to be considered in New Zealand in response.
- 6.3 In this chapter, information “in electronic form” means information that exists as:³⁸⁶
- (a) electronic representations of text or graphic documents;
 - (b) an electronic image, including a video image of a document, exhibit or other thing;
 - (c) data in the fields or files of an electronic database; or
 - (d) an audio or video recording, analog or digital, of an event or notes in an electronic file from which a transcript of an event can be prepared.
- 6.4 Documents held by a court in electronic form may have been created in an electronic form originally (for example, judgments, documents filed electronically by the parties), or created in a hard copy and then scanned and retained by the court in electronic form. An example of the latter is in the Māori Land Court, where the entire historical record of the court has been scanned.
- 6.5 “Electronic filing” or “e-filing” is used to mean filing documents in court by email rather than paper. It does not include filing by facsimile.

386 Definition adopted from COSCA Guidelines: MW Steketee and A Carlson, *Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts*, National Center for State Courts and the Justice Management Institute, 18 October 2002, section 3.40, p 20. www.courtaccess.org/modelpolicy (last accessed 16 October 2005).

- 6.6 “Remote access” means the ability to electronically search, inspect or copy information in a court record, without the need to physically visit the court facility where the court record is maintained. Such access might be over the Internet, or by a dial-in service. Remote access can involve access for the parties and their lawyers only, or access for the general public.³⁸⁷

ELECTRONIC RECORDINGS OF HEARINGS

- 6.7 Much of the discussion in this chapter relates to text documents that are held in electronic form and can be viewed, transferred and downloaded on-line. Specific comment should also be made about recordings of hearings, which also fall under the definition of records held in electronic form.
- 6.8 As noted in chapter 3, most court hearings are electronically recorded and the recordings kept on tapes or discs for a period of time. In many cases, particularly in the lower courts, no transcript is subsequently typed up, unless there is an appeal. In this case, the appellant pays for the transcript. We consider that electronic recordings on tapes or discs are part of the court record, though not of individual case files, because generally several cases are recorded on one disc.
- 6.9 In our consultation draft, we recommended that, if there were no transcript, it should be possible for a person requesting access to the record of hearing to listen to the tape at a courthouse, or have the tape copied at their own expense, with leave of a judge.
- 6.10 However, we have reconsidered this suggestion after submissions and consultation. Concern was expressed that In-Court Media Coverage Guidelines have been developed to protect and control the use of information recorded in court, but that these guidelines may not be observed if people can simply copy tapes and broadcast material from them after the hearing.
- 6.11 The Ministry of Justice noted that it would require considerable resources to supply tape players, ear phones, and facilities and quiet spaces where people could listen to recordings in all courts. Moreover, the Ministry advised that the tapes or discs often cover more than one hearing, so the suggestion that tapes or discs could be labelled if there were a suppression order in place after a hearing, or if evidence had been ruled inadmissible, would be difficult to administer in practice.
- 6.12 We have therefore concluded that the electronic recordings themselves should not be accessible, but that if a record of the hearing is requested and there is no transcript available, requesters should be able to have a transcript produced from the electronic recordings, at their own expense.

OTHER ELECTRONIC DOCUMENTS

How do records in electronic form differ from records in paper form?

- 6.13 Court documents held in electronic form have been described as lacking the “practical obscurity” that has existed in relation to their paper counterparts.³⁸⁸ This concept refers to the fact that, in practice, having to physically attend at the court office and inspect a paper record in person limits access to the record,

³⁸⁷ This is also adopted from the COSCA Guidelines, section 3.30. Where it is used in this chapter, remote access refers to access via a computer and does not include by facsimile.

³⁸⁸ *United States Department of Justice v Reporters Committee for Freedom of the Press* 489 US749 (1989).

and there is a practical limit to the amount of data that can be searched in any period. Once records are stored and accessible electronically, and made available remotely, these impediments are removed.³⁸⁹

- 6.14 Unlike paper records, on-line electronic documents can be transmitted and received almost instantly, and stored and copied at negligible cost. The information they contain can be used in ways that were previously impossible or impractical. Information can be downloaded in bulk, and the range of commercial purposes for which it can be used is significantly increased, particularly if the records are accessible remotely.³⁹⁰
- 6.15 Court records are a rich mine of personal and confidential information, including financial statements, bank account details, medical and family information, dates of birth, addresses, and a range of unique identifiers such as Inland Revenue numbers, passport numbers, income support or hospital numbers.
- 6.16 In the United States, when court records were made available over the Internet in some states, the information was used for direct marketing by dating agencies, nappy manufacturers, health centres and for information brokering and data matching. Concerns have also been raised about the use of information from electronic court records to facilitate identify theft, intimidation of witnesses, stalking and harassment.

STATUS OF ELECTRONIC COURT RECORDS IN NEW ZEALAND

E-filing and remote access to court records

- 6.17 Electronic filing is in its early stages in New Zealand. Remote access to substantive electronic court records is even less developed – the only court likely to be able to offer such access in the foreseeable future is the Māori Land Court, but there are significant issues relating to ownership of historical records and privacy to be resolved first.³⁹¹

389 Note, however, a contrary view expressed by James Chadwick in *Access to Electronic Court Records: an Outline of Issues and Legal Analysis*, 11, www.courtaccess.org/legalwritings/chadwick2001.pdf, (last accessed 22 June 2006) who suggests that practical obscurity is largely an illusion – thanks to private information providers, the scope of information that can presently be obtained is limited only by the pocket book of the person seeking the information. The primary effect of restricting electronic access to court records is simply to ensure that those with adequate means will be able to obtain information and those with limited means will be denied the same remote access.

390 There is already some use made of court information in New Zealand for commercial purposes – for example, there is a longstanding practice of collecting court information for credit reporting and assessment purposes. In New Zealand, the publishers of the *Mercantile Gazette* collect information from paper court records, via their own search clerks, relating to bankruptcies; judgment debtors, liquidations and receiverships on a weekly basis and on-sold this via the *Gazette*. Information brokers are a common feature of all similar jurisdictions. Publishers of case law are traditionally granted bulk access to judgments.

391 The Electronic Transactions Act 2002 has recently been enacted in New Zealand to facilitate transactions using documentation in electronic format. Part 3 provides that a legal requirement can be met by electronic means if the relevant provisions of the Act are met. However, this Part of the Act does not apply to most courts, unless a court's rules or guidelines specifically provide for the use of electronic technology in accordance with it. The Employment Court is the only court not specifically exempted from the Act, and has issued a practice direction to deal with the Act's requirements – Practice Direction of the Employment Court 29 April 2005. It appears the omission of the Employment Court from the Electronic Transactions Act 2002 is an oversight.

- 6.18 The Supreme Court Rules provide for filing and service by email,³⁹² but, in practice, much of the material filed with the Court is still in paper form only. Originating applications must be filed by hand or post in both civil and criminal cases. No parts of Supreme Court files are held solely in electronic form, but all court correspondence and judgments are created electronically as well as in hard copy.
- 6.19 The new Court of Appeal (Civil) Rules 2005 provide for filing and service by email,³⁹³ but, as in the Supreme Court, originating applications must be filed by hand or by post. Bundles of authorities must also be filed by hand or by post, with four copies provided. While the rules allow for email filing of submissions, they also require four copies to be filed, and court staff indicate that, in practice, they prefer to receive those in hard copy. In relation to cases on appeal, the rules are clearly directed at hard copy documents.³⁹⁴
- 6.20 There is no provision for e-filing in the Court of Appeal (Criminal) Rules 2001, nor as yet in the High Court, District Courts, Family Court, or Environment Court. There is no remote public access to electronic records (excluding judgments) in these courts either.
- 6.21 The Employment Court issued a practice direction in April 2005, advising that court registries would, from that date, accept or continue to accept for filing documents transmitted by facsimile or email.³⁹⁵ In practice, few practitioners use the e-facility, particularly if there is a fee to pay.
- 6.22 The Māori Land Court holds most of its records in electronic form under the Māori Land Information System (MLIS) (as well as in hard copy). There are three components to MLIS: current land information, historical information, and the workflow management system, which is a case management system allowing cases to be tracked electronically by the Court. There is no public access to the workflow management system. Applications, orders and incoming correspondence of the Māori Land Court are scanned into the system and held in both paper and electronic format. Minutes and correspondence from the Court are digitalised. Anyone can download an application form from the website and email it to the Court, but, as yet, fees cannot be paid electronically.
- 6.23 The current land information is held in digital form, and has a search facility. Remote Internet access to the current land information is now available to Māori landowners.³⁹⁶
- 6.24 The historical record of the Court has been scanned into an electronic database. Most of the documents come from the Minute Books. This information can be accessed electronically at the courthouse, but not remotely. There is considerable

392 Supreme Court Rules 2004, r 10. Originating applications are applications for leave to appeal, notices of appeal and cross appeal.

393 Court of Appeal (Civil) Rules 2005, r 10. The rules came into force on 1 May 2005.

394 Court of Appeal (Civil) Rules 2005, r 40, for example r 40(4)(a), which sets out the requirements for binding of volumes.

395 As at 22 June 2006, the Employment Court website still advised that on-line filing was not available www.justice.govt.nz/employment-court/filing/registry.html (last accessed 22 June 2006).

396 *Minister launches new Māori Land Court web-based tool*, Hon Rick Barker, Minister for Courts, Press Release, 30 November 2005 www.beehive.govt.nz (last accessed 7 December 2005).

debate around the issue of remote electronic access to the historic land record. The central issue is concern about unrestricted access by the public to evidence set out in Minute Books relating to matters such as whakapapa,³⁹⁷ evidence as to land ownership, wāhi tapu,³⁹⁸ and urupa.³⁹⁹ A Māori Land Court focus group, appointed by the Iwi Consultation Forum established by the Court, is currently considering the issues involved.

Remote access to court calendars, case summaries and lists and schedules

- 6.25 The Supreme Court provides remote public access to its “current hearings” calendar via the Courts of New Zealand website.⁴⁰⁰ This lists the case number, full names of parties, date of hearing, names of judges and date of judgment. The Supreme Court also creates case summaries of each case which can be accessed through the website, and which provides similar details, together with a brief summary of the issues, the date the leave application was filed, the leave decision, the appeal hearing date and subsequent decision. The Court also provides remote public access to full transcripts of all its hearings via a “transcripts” link.
- 6.26 The Supreme Court is presently developing an Appeal Management System (AMS) database. This will include details of applications, parties (with links to counsel), the lower court judgment under appeal, a checklist, status of the matter, including which staff are involved in it, hearing details, history of the matter and various documents (such as submissions). This system is intended for the use of court staff only. It will not be accessible to parties or to members of the public.
- 6.27 Another court providing calendar information on the Internet is the Māori Land Court, which publishes a “Panui” that sets out all the lists of Māori Land Court hearings for the month with venues, dates and times. This Panui is also published and distributed in paper form.
- 6.28 The major information technology system currently used by the courts to process and manage the flow of cases through the courts system is the Ministry of Justice Case Management System (CMS).⁴⁰¹ In part it serves as a court calendar listing parties and hearing dates among other information. There is no remote public access to CMS. People with access to CMS include court staff and Ministry of Justice staff, subject to access protocols.

Future developments in New Zealand

- 6.29 E-filing and remote access may be in their early stages in New Zealand, but given information technology developments, trends in courts overseas, and the drivers of long-term cost efficiencies, it is only a question of time until remote access to

397 Genealogy, the principle of kinship.

398 Sacred place, reserved ground.

399 Burial place.

400 www.courtsofnz.govt/ (last accessed 22 June 2006). Daily lists for the High Court and Court of Appeal are now also available on this website.

401 Report of the Ministry of Justice – Baseline Review, Appendix A (Wellington December 2004) www.justice.govt.nz/pubs/reports (last accessed 19 April 2006).

electronic court records becomes technically possible in New Zealand.⁴⁰² Regardless of whether it occurs in the medium- or long-term future, access rules to deal with the change in format will be needed.

- 6.30 Given the present status of e-filing in New Zealand, we have the advantage of being able to learn from the experiences of overseas jurisdictions that are more advanced in terms of electronic court records. At this stage, it would be premature to make any firm recommendation as to whether to allow remote public access to court records. We recommend, instead, that this matter continue to be assessed against overseas experiences, and that careful consideration of appropriate policies to deal with the issues raised should receive the same priority as work on the technological advances in e-filing systems and capability, so that our approach to remote access, by the time it is a foreseeable reality in New Zealand, will be proactive, rather than reactive.

INTERNATIONAL APPROACHES TO E-FILING AND E-ACCESS

- 6.31 In many comparable overseas jurisdictions, court records have already moved to an electronic format or are well on the way to being held in electronic form. In this section, we review these developments, the access rules that have been developed and the approaches taken by various committees tasked with considering the implications of the electronic form.

United States

- 6.32 The approach to access rules in the United States is influenced by the fact that, unlike New Zealand and other jurisdictions, court records in the United States are generally considered to be “public records” and there is a common law right of public access to them.⁴⁰³

Federal Courts

- 6.33 In September 2001, the Judicial Conference of the United States (representing the federal judicial interests) issued a policy on privacy and public access to civil, appellate and bankruptcy court records.⁴⁰⁴ It recommended that the same remote access rules apply to records held in paper and e-form except that certain redactions of personal identifiers were to be undertaken when records were filed electronically.⁴⁰⁵ Criminal files were not to be part of the policy until a two-year implications review was undertaken.⁴⁰⁶
- 6.34 The privacy protections in the policy were essentially two-fold. The filing attorney would have legal responsibility for ensuring redaction of personal

402 We agree with the views of Dougal McKechnie in “The Use of the Internet by Courts and the Judiciary: findings from a study trip and supplementary research”, (Department for Courts and the Law Foundation, Wellington, August 2002).

403 *Nixon v Warner* (1978) 435 US 589, 597. There is a common law right to “inspect and copy records and documents, including judicial records and documents”. This is not the case in New Zealand, the United Kingdom, Australia or Canada.

404 United States Federal Courts “Judicial Privacy Policy Page”, www.privacy.uscourts.gov (last accessed 8 October 2005).

405 Social security numbers and financial accounts numbers be redacted to the last four digits; names of minor children to initials; dates of birth to year of birth; home addresses to city and state.

406 It is important to remember that the Federal Courts in the United States do not hear family or juvenile cases.

information in accordance with the policy, and reviewing whether a motion to seal should be made, and, if so, make it.⁴⁰⁷ Filing attorneys had an obligation to consider whether it was necessary to file a motion to seal at the same time as filing where the documents contain certain categories of information.⁴⁰⁸

- 6.35 Most Federal Courts now have full e-filing and remote public access.⁴⁰⁹ Apart from the originating document, which must be served in person, in civil cases it is now compulsory for all attorneys to file all court documents electronically. Litigants in person may file in paper, but these documents are scanned into the e system at court houses. Affidavits are likewise sworn in paper form but scanned in. The electronic record is the official court record, and pin numbers replace signatures of attorneys.
- 6.36 The Federal Judiciary has a centralised electronic public access service for remote access to Federal Appellate, District and Bankruptcy Court records, called PACER (public access to electronic court records). Anyone can register, and view and download information, including full court records in most courts.⁴¹⁰
- 6.37 In September 2003, the Judicial Conference recommended that criminal files be treated in much the same way as civil and bankruptcy case file documents, except that some documents would not be available to the public either electronically or in paper form.⁴¹¹ People filing criminal documents would be obliged to partially redact specific personal identifying information from documents before filing.

State courts

- 6.38 Developments in court record e-filing vary widely at state level. In 2002, the Conference of Chief Justices and the Conference of State Court Administrators endorsed a set of guidelines known as the COSCA Guidelines, to assist state

407 Assistant Professor Teresa La Master, Assistant Dean for Technology Affairs, Chief Information Officer and Lecturer in Law at the University of Maryland advised Law Commission personnel in June 2005 that, though there was initial resistance from attorneys, these duties were soon after accepted and managed with ease. Motions to seal are made liberally and redaction is a simple exercise using the find and replace function in Word.

408 This was for medical records; employment histories; individual financial information; proprietary or trade secret information; information on persons cooperating with the government; information about victims of criminal activity; national security information and sensitive security information.

409 Virtually every court has at least an electronic docket system; a number provide links to PDF versions of all court generated documents (such as orders).

410 www.pacer.psc.uscourts.gov/ (last accessed 20 June 2006). Parties have remote access without charge. All others have remote access on the basis of US\$.08 per page, regardless of whether it is viewed or downloaded, except that no fee is charged if a person's charges are less than US\$10.00 per year.

411 *Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files*, www.privacy.uscourts.gov/crimimpl.htm (last accessed 8 October 2005). The exceptions were unexecuted search warrants; pre-trial bail or pre-sentence reports; juvenile files; documents identifying jurors or potential jurors; financial affidavits accompanying applications for representation; ex parte requests or any sealed documents.

courts in developing electronic access policies.⁴¹² Rather than creating a model policy, this document set out guidelines as to the issues that states should take into account in developing their rules, and options as to how to deal with them.

- 6.39 The guidelines in general presume that case records are open, but allow for restrictions on access to all or part of those records, for reasons including privacy, public safety, risk of injury, or to minimise public reluctance to use the courts.
- 6.40 A number of states have used the guidelines to develop access rules or policies.⁴¹³ Some states have adopted a conservative approach, providing electronic access to indexes, calendars, registers, orders and opinions, but not full case records. Others have adopted a broad approach, providing case file documents as well as information about the case and court-generated documents. However, even in courts offering access to full case documents, there are typically rules in place that restrict access to personal identifying information or to case types that are confidential, such as adoption or mental health matters.

Canada

- 6.41 Canadian courts are not as advanced in e-filing as those in the United States, but are generally more advanced than New Zealand. Most courts provide, at the least, remote public access to court calendars. In May 2003, the Judges Technology Advisory Committee of the Canadian Judicial Council presented a report entitled *Open Courts, Electronic Access to Court Records, and Privacy* (JTAC Report).⁴¹⁴ The JTAC Report set a framework within which electronic access policies might be established.
- 6.42 Following public consultation, in September 2005, the Canadian Judicial Council approved a framework for a model policy developed by the JTAC for access to court records in Canada.⁴¹⁵ The report describes two possibilities that arise from the move towards electronic access: first that the realisation of the open courts principle may be significantly enhanced through the adoption of new information technologies, and secondly that unrestricted electronic access might facilitate uses of information not strongly connected to the underlying rationale for open courts, and that might have a significant negative impact on values such as privacy, security and the administration of justice.

412 MW Steketee and A Carlson, *Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts*, above n 386. The background to the development and endorsement of the Guidelines is set out in the report at page vi. A further report released in October 2005 sets out additional discussion of three distinct areas of the guidelines, namely materials for educating litigants and the public; expanded consideration of the challenges of access to family court records, and considerations of internal court policies and procedures – A Carlson and M W Steketee, *Public Access to Court Records: Implementing the CCJ/COSCA Guidelines Final Project Report* (National Center for State Courts, 15 October 2005).

413 Examples include Alaska, Georgia, Indiana, Minnesota, Nebraska, North Dakota, Pennsylvania and South Dakota: California Court Technology Advisory Committee *Public Access to Electronic Trial Court Records: A Progress Report on the Implementation of Rules 2070-2077 of the California Rules of Court*, (Judicial Council of California, San Francisco, California, 22 November 2004) 6.

414 Judges Technology Advisory Committee for the Canadian Judicial Council, *Open Courts, Electronic Access to Court Records, and Privacy*, May 2003.

415 Judges Technology Advisory Committee for the Canadian Judicial Council, *Model Policy for Access to Court Records in Canada*, September 2005.

6.43 The model policy proceeds from a starting point that the open courts principle is a fundamental constitutional principle and should be enabled through the use of new information technologies. Restrictions on access to court records can only be justified where:

- (a) they are needed to address serious risks to individual privacy and security rights, or other important interests, such as the proper administration of justice;
- (b) they are carefully tailored so that the impact on the open courts principle is as minimal as possible; and
- (c) the benefits of the restrictions outweigh their negative effects on the open courts principle, taking into account the availability of this information through other means, the desirability of facilitating open access, for purposes strongly connected to the open courts principle, and the need to avoid facilitating access for purposes that are not connected to the open courts principle.⁴¹⁶

Australia

6.44 In Australia, courts have begun providing access to both case listing information and some court records in electronic form. Hearing lists and court calendars are generally available on most court websites. In most jurisdictions, these are simply electronic replicas of the hard copy lists.⁴¹⁷

Federal Court

6.45 The Federal Court of Australia provides a number of services on-line:⁴¹⁸

- eSearch, which allows the public to search for information on specific cases, including participants in the case, dates that matters are listed and the text of orders made, but not the content of filed documents;
- eFiling, which enables litigants to lodge applications and other court documents electronically, and includes facilities for payment of any filing fees by credit card;
- eCourt Forum, which allows parties to participate in a “virtual courtroom” for pre-trial matters, enabling directions and other orders to be made on-line by the relevant docket judge and the receipt of submissions and affidavit evidence as if parties were in a normal courtroom.

Victoria

6.46 In Victoria, documents in civil matters in the County Court can be filed electronically. The Court also provides a free Internet search facility, “Court Connect”, which makes selected information from the Court’s case

416 Judges Technology Advisory Committee, above n 415, ix.

417 A Wallace, *Overview of Public Access and Privacy Issues*, paper presented at a conference on “Courts for the 21st Century – Public Access, Privacy and Security”, Queensland, November 2003.

418 During 2003, the Federal Court undertook a detailed review as to how it might bring together the various elements of its eCourt strategy so that judges, staff, legal practitioners and the public could access case information and use such facilities as the eCourt Forum and electronic filing from within a single environment. The review has led to the development of the “My Files” concept, whereby a single web-based interface (or portal) will integrate the electronic provision of information and services. The “My Files” project will be implemented on a phased basis over the next few years: www.fedcourt.gov.au (last accessed 8 October 2005).

management system in civil matters available to any person.⁴¹⁹ However, the information available on-line does not include the contents of documents or full details of orders or judgments. Where a suppression order has been made (either of a case or of a particular document filed in that case), no details of that case or of the particular document will be available for searching.

New South Wales

- 6.47 The New South Wales Supreme Court has public access index searches to certain case information on Courtnet through public terminals in the registry. Index searches can be performed by any non-party to access plaintiff or defendant names in civil or criminal cases. Non-parties can then access information relating to case number, name of plaintiff, name of defendant, details of solicitor on the record, and whether a liquidator had been appointed or probate granted. Some external organisations (for example, the Police Criminal Records Unit, Crown Solicitor's Office, Legal Aid Commission) also have remote access to Courtnet to use as an index search option, which allows access to information, including when a matter commenced, what documents have been filed, what orders have been made and when the case has been listed.
- 6.48 In 2004, the Supreme Court released a consultation paper and draft policy on access to court documents by non-parties, prompted by the implementation of a new computer system, CourtLink, across the Supreme, District and Local Courts.⁴²⁰ It proposed a restrictive approach that provided no public access to court records on-line, and restricted access for lawyers to the records in cases they are involved in. However, no consensus on the policy was reached during community consultations, and no new rules governing access to court records on-line have yet been enacted.
- 6.49 In 2007, the New South Wales Courts and Tribunal Service plans to introduce a range of services to the legal community through the Internet. Services known as eFiling and eForum began to be introduced on a limited basis in cooperation with a small number of firms, from November 2005. This implementation process focuses on eFiling (Corporations and Possession Lists in the Supreme Court) and eForum (selected matters in the Equity Division and matters in the Court of Criminal Appeal where either an Application for Extension of Time or a Notice of Appeal has been lodged by the Legal Aid Commission).⁴²¹

South Australia

- 6.50 The Supreme Court of South Australia has issued a Practice Direction dealing with the introduction of an e-filing system in the Supreme Court and District Courts.⁴²² Subject to any specific direction by a judge or master, and the development of the technical facility to support such access, registered users will

419 www.countycourt.vic.gov.au (last accessed 8 October 2005). The information available for all civil cases initiated since 1 January 1996 is the case number, party names, a list of documents filed, a summary of any judgment or order made, plus dates of hearing for events listed.

420 Supreme Court of New South Wales, *Draft Policy – Non-party access to court records*, 13 May 2004.

421 Announcement "CourtLinkNSW eServices" (28 October 2005) Lawlink NSW website, www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/WebAnnounce (last accessed 20 December 2005).

422 Supreme Court of South Australia Practice Direction No. 54, E-Filing Pilot.

be entitled to read-only access to any file on which that user has filed a document. The user may also download a paper copy of the content of such a file.

- 6.51 Any other person may apply to the registrar at the registry for permission to search a specified file. If the registrar is satisfied that the request is in accordance with the usual rules relating to access to documents, he or she will grant approval or conditional approval. A personal computer and associated printer will be assigned to the inspecting party to enable inspection to be carried out.

Summary

- 6.52 In view of the overseas experiences, we can say that the availability of court records on the Internet, and e-filing, would have a profound effect on the organisational, operational and managerial aspects of the New Zealand court system.⁴²³ While it is not a panacea for the problems of delay, cost and access to justice in the legal system, it has the potential to play a significant role in addressing some of these problems. There has been consensus in all overseas committees tasked with considering its implications, however, that significant privacy and security issues are raised. Differences emerge around recommended solutions – though there are some baseline recommendations that are made in all reports.
- 6.53 Recommended policies are also unique to each jurisdiction, arising from the review of each jurisdiction’s relevant statutes and common law. The more recent reports tend to express greater concern about the implications of remote public access on the administration of justice, and to emphasise the need for steps to be taken to protect privacy. No doubt recommendations and practices will continue to evolve.

PROTECTING PERSONAL INFORMATION – AN APPROACH FOR NEW ZEALAND

- 6.54 Regardless of the form in which court records are held, there will always be a risk of the personal information held in them being misused. But the need to adopt approaches protecting certain personal information will be more acute as e-filing and e-access become an increasing feature of the New Zealand court system.

Privacy

- 6.55 The key issue for New Zealand when considering access policies to e-court records is the same as that in comparable overseas jurisdictions – privacy. While some surrender of privacy is inevitable for court users, the question in relation to electronic records is how far such privacy losses should be allowed to go.
- 6.56 As experience in the United States shows, the “collateral” uses to which personal information in court records that are accessible on the Internet can be put, move well beyond traditional credit reporting. There is no reason to believe that similar issues would not arise in New Zealand if unlimited electronic access were

423 K Gottlieb “From Public Access to Public Dissemination: Have Courts Crossed the Line in Posting Domestic Relations Court Record Information on the Internet?” (2002, E-filing Report 2:7-8, USA); William A Fenwick and Robert Brownstone “Electronic Filing What is it? What are its implications?” (19 Santa Clara Computer and High Tech. LJ. 181, December 2002, as revised 26 November 2003).

available. While some statutory provisions protect the privacy of court users and those identified in court documents, large amounts of personal information contained in court records do not attract such statutory protections.

- 6.57 Access rules should not facilitate open-ended commercial or other unanticipated uses of personal information in court records.⁴²⁴ If they do, they have real potential to undermine the confidence of the public in the fair administration of justice, and create disincentives for people to use the justice system. While there are those who will be able to afford to seek private justice, others will not. This view is consistent with the earliest statements of the principle of open justice, which allow for privacy when its purpose is to ensure the administration of justice is not hindered.
- 6.58 Consequently, we consider that steps should be taken to protect the personal privacy and security of court users and people identified in court documents when the record is held in electronic format.

Is personal information necessary in this court record?

- 6.59 Some personal information contained in court records is not necessary for the purposes of proving or disproving the case. In Canada, the JTAC *Model Policy for Access to Court Records* recommends that rules governing the filing of documents in the court record should prohibit the inclusion of unnecessary personal information. Such information should be included only when required for the disposition of the case and, when possible, only at the time it actually needs to be part of the court record.⁴²⁵
- 6.60 Similar steps could be considered in New Zealand, to ensure that unnecessary personal information is not sought from court users in standard forms, or included by lawyers when drafting documents.
- 6.61 Similar issues can arise for judges – sometimes written judgments can also contain unnecessary personal information, or disclose personal data identifiers that are incidental to the decision. In its model policy, the JTAC noted that, unlike documents filed by the parties, judgments are much more likely to be published in case law reports and databases, so the inclusion of personal data identifiers in these documents constitutes a much higher risk for the personal safety of participants in judicial proceedings.⁴²⁶

Redact personal information in court records

- 6.62 Where personal information is necessary in the context of a proceeding, steps can be taken to edit or “redact” specific personal information prior to court records being filed, in the interests of avoiding identity fraud and protecting privacy. The full information could be given at the time it was specifically needed

⁴²⁴ In this respect we note the recommendations of the JTAC Report that “fair information practices suggest that information which has been collected is used for the purposes it is provided and not a collateral purpose”. See also the Privacy Act 1993 (NZ) principle 10.

⁴²⁵ Judges Technology Advisory Committee, above n 415, para 2.1.

⁴²⁶ Judges Technology Advisory Committee, above n 415, pp 8 – 9, see also Canadian Judicial Council, Use of Personal Information in Judgments and Recommended Protocol, www.cjc-ccm.gc.ca/article.asp?id=2811 (last accessed 26 May 2006).

in the hearing, but not form part of the public record. Typically, the information requiring protection, and common solutions suggested in North America in this regard are:

- alteration of social security numbers (for example, by editing to first or last four digits);
- alteration of financial account numbers (for example, by editing to first or last four digits);
- reducing names of minor children to initials;
- reducing full dates of birth to the year;
- reducing full residential addresses to city and state.

6.63 There is no real equivalent to social security numbers in New Zealand – the closest comparison may be drivers’ licence numbers, which are used as a common form of identification, but there is a range of other identifiers to be considered. Published and publicly accessible protocols could be developed in New Zealand for the redaction of Inland Revenue numbers, accident compensation numbers, hospital system numbers; passport numbers, bank account numbers, names of minor children, addresses, phone numbers and dates of birth.

6.64 An alternative to redacting the information from the hard copy court record would be to redact on the electronic version only. The personal information could be filed as part of the court record but tagged so that the electronic record contains the altered information. This would require compatible software between filing lawyers and the courts.

6.65 Most committees that have considered on-line access recommend that the responsibility for ensuring personal information in court records is redacted, and if necessary protected by a sealing application, should rest with the lawyers who file the documents in court. Where litigants are self-represented they can be assisted by clear guidance being provided in court precedents and forms.

6.66 It should be remembered, however, that while redaction may prevent identity theft and reduce the use of information for commercial purposes, it is not a guarantee of privacy. In a recent New Zealand incident, the Family Court included information in relation to a custody dispute on its website. The names of the couple concerned and their children were reduced to initials, and the children’s ages, the town they lived in, and some business details were included. The redacted information was still sufficient for neighbours to identify the couple.⁴²⁷

Deny remote public access to court records

6.67 Another possible response to privacy concerns raised by electronic court records is to not allow any remote public access to electronic case files, and allow remote access only by parties or their counsel, court staff and the judiciary. (This could mean either that the public only has access to paper files, or that it only has access to electronic records at a terminal at the court house.)

⁴²⁷ Nick Smith, Press Release New Zealand National Party, Wednesday 12 October 2005.

- 6.68 This approach has been specifically rejected in the United States on the basis of open justice principles, but it is recommended in a number of other reports, including the recent model policy approved by the Canadian Judicial Council.⁴²⁸
- 6.69 Even if remote public access to case files were to be denied, it could still be given to court calendars, skeletal case information, judgments and orders, thereby enabling the electronic medium to play a role in enhancing public access to justice and open justice principles.
- 6.70 The advantages of allowing remote public access to electronic court records include: simplicity; increased access to open justice; more convenient use by media and researchers and the public at large. It is possible that the privacy disadvantages and risks can be adequately minimised by the identified protective measures (such as redaction) that typically operate in jurisdictions where there is remote public access, but, in our view, it is too early to be confident of this.
- 6.71 The first New Zealand court to develop an e-access policy for third-party access to court records is likely to be the Māori Land Court. Though the historic record has long been available to any member of the public who turns up at the Māori Land Court registry, there has been widespread concern among Māori at the prospect of public access being available to Māori Land Court records on-line.
- 6.72 We consider that the options as to remote public access should remain open for the moment. Many overseas jurisdictions already have near complete e-filing and we should wait to gain the full benefit of their practical experience in providing or denying remote public access. No decision should be made until the public has been fully consulted.
- 6.73 The question will be whether the undoubted benefits of remote public access are outweighed in New Zealand by the risk of diminished public confidence in the administration of justice, resulting from a loss of privacy of court users.

Future safeguards for remote access

- 6.74 When remote electronic access to court records becomes a foreseeable reality in New Zealand, overseas experience suggests there are a number of other safeguards to limit the risks to privacy and security that should be considered.

Allow sealing of applications at time of electronic filing

- 6.75 The risks to privacy of providing remote public access could be mitigated by allowing applications to seal documents at the time of filing, as in the United States Federal Courts.⁴²⁹ The motions to seal have the automatic effect of sealing the record until it is challenged. Applications are liberally made and liberally granted in the Federal Courts, and where records contain sensitive information (such as medical records, trade secrets or individual financial details) there is prima facie justification for sealing.

⁴²⁸ Judges Technology Advisory Committee, above n 415, para 4.6.3.

⁴²⁹ United States Federal Courts, above n 404.

Creating exceptions if remote public access is allowed

- 6.76 Another option is to create limited exceptions to those documents to which remote public access is allowed. The COSCA Guidelines suggest that access to some information in a court record should be available at the courthouse only, not remotely.⁴³⁰
- 6.77 In Canada, the JTAC Report suggested that the differentiation could be made on the basis of categories of court files, or by category of user, with remote access available, for example, to credit bureaux, while other users might get on-site access only. Clearly, a rational justification would be required for any such differentiation, and the criteria would need to be published and implemented.⁴³¹
- 6.78 We do not consider that criminal records should be posted on-line, regardless of whether other records are made available remotely, because of the risks presented to a fair trial. Essentially a person's criminal charge or conviction would be available for anyone to view and download. A database could be built for later dissemination – either for commercial reasons, or by lobby groups. Our concerns are supported by the Criminal Records (Clean Slate) Act 2004 which enables a person who satisfies the eligibility criteria to have their criminal record effectively expunged. Posting criminal records on the net could undermine the policy behind the Act.
- 6.79 There will be other categories of records to which there should be no remote public access. A test could be developed to determine whether proceedings fall into that category: would remote public access to records create prejudice to a fair trial, the policy of a statute, the safety or security of a person, or public confidence in the administration of justice?

Remote public access to bulk distribution of court records

- 6.80 Bulk access is the ability to have systematic and direct access to all or a significant subset of court record information or documents, including compiled information.⁴³² The issue of whether access rules should allow bulk access is controversial. Those primarily interested in it are often pursuing private commercial ends.⁴³³ Some argue that, if the purpose of public access to court records is to ensure a justice system beyond reproach through public scrutiny of its activities, permitting court information to be used for marketing purposes tarnishes and cheapens the justice system. It does not promote justice, and interferes with a person's right to control their personal information.⁴³⁴

430 MW Steketee and A Carlson, above n 412, section 4.50. Many of the examples given of permissible differentiation in proceedings are matters that would not be open to the public anyway under statute in New Zealand, except for civil proceedings under the Harassment Act 1997.

431 Judges Technology Advisory Committee for the Canadian Judicial Council, above n 414, para 138.

432 Judges Technology Advisory Committee, above n 415, 15.

433 Note that researchers often require bulk access to a subset of case records but for the purpose of this discussion we are distinguishing them from other bulk access requesters.

434 K Gottlieb *Using Court Record Information for Marketing in the United States: It's Public Information, What's the Problem?* January 2004, www.sics.se/privacy/wholes2004 (last accessed 24 May 2005) page 7. Fenwick and Brownstone observe that courts in the United States will be more tolerant of restrictions on bulk transfers, for similar reasons to those raised by Gottlieb: Fenwick and Brownstone, above n 423.

- 6.81 In the United States, the COSCA Guidelines came down in favour of permitting bulk distribution and comment that the reasons access was sought should not determine the response to access decisions.⁴³⁵ In contrast, the JTAC advice in Canada is that it might be permissible to prohibit bulk access. Its approach is that the purpose for which bulk access is sought is crucial to the decision whether to afford access to all or part of court records and docket information.⁴³⁶
- 6.82 We are of the view that bulk access to court record data should be approached with extreme caution. While there may be some uses of bulk data which do not raise concerns (such as public interest or academic research, use by credit agencies, compiling of judgments), in other cases bulk access may enable the use of court information for more dubious purposes that do raise concerns.

SUMMARY

RECOMMENDATION

R24 The issue of whether to allow remote public access to court records held in electronic format should continue to be assessed against overseas experiences. Careful consideration of appropriate policies to deal with the issues raised should receive the same priority as work on the technological advances in e-filing systems and capability.

- 6.83 While remote access to substantive court records in electronic form is not yet a reality in New Zealand, we can conclude from overseas experience that the format of the record does raise additional considerations for access rules. The chief issue is the protection of personal information contained in court records.
- 6.84 We should continue to monitor closely the experiences in other jurisdictions, and the efficacy of the responses they develop to deal with these concerns. As the foregoing discussion illustrates, there is a range of options for reducing the risks to personal information that the electronic format raises, including limiting the amount of personal information that is included in court records in the first place, redacting that information where necessary, or denying remote public access to some or all electronic files.

⁴³⁵ MW Steketee and A Carlson, above n 412, page 30.

⁴³⁶ Judges Technology Advisory Committee, above n 415, para 128.

Chapter 7

Media access

THE CURRENT SITUATION

- 7.1 The media has a crucial role to play in translating the principle of open justice into reality:

*It is an excellent thing that any member of the public can walk into any courtroom, watch the proceedings and listen to what is said. But for the public as a whole to be informed about important or interesting matters which are going on in the courts the press is crucial. It is through the press identifying the newsworthy cases, keeping itself well informed about them and distilling them into stories or articles in the newspapers that the generality of the public secure the effects and, I trust, the benefits of open justice. I am not suggesting that everything is always peace and light between the judges and the press, but the judges know, and have often said, that the press is critically important to public awareness and scrutiny of the way in which justice is administered.*⁴³⁷

- 7.2 There are laws and conventions that recognise the special role of the media in reporting information about court proceedings. Although members of the public cannot attend either the Youth or Family Courts without special permission, in some cases accredited media can.⁴³⁸ By convention they can attend voir dire and chambers hearings in the High Court and are also allowed to attend bail hearings, even though facts that are adverse to an accused and that may be inadmissible at a subsequent trial may be aired. They are allowed to sit in the press benches, and take notes in court, which members of the general public cannot do. They also have some special privileges, for example, they are provided with copies of all informations on the morning of the first hearing of criminal charges.⁴³⁹
- 7.3 The Ministry of Justice advises court staff that they have an obligation to give the media “all reasonable assistance” to ensure accurate reporting.⁴⁴⁰ However, this is qualified by the statement that media representatives who are interested in a case are expected to attend the hearing, and if they do not, they then are not entitled to information about it as of right, but may have

⁴³⁷ *Re Guardian Newspapers Ltd* [2005] 3 All ER 155, para 22.

⁴³⁸ Care of Children Act 2004, s 137; Children, Young Persons, and Their Families Act 1989, s 329.

⁴³⁹ The information is the document that sets out the charge in criminal proceedings. These must be returned at the close of court for the day.

⁴⁴⁰ Ministry of Justice Guidelines for Staff, *Dealing with Requests for information about Criminal Cases or Access to Criminal Files*, Ministry of Justice 2004, para 4.6, page 9.

their enquiries considered in accordance with the criminal records search rules,⁴⁴¹ (or, presumably, the applicable civil rules).

In-court media coverage of proceedings

7.4 The In-Court Media Coverage Guidelines 2003 apply to television, photographic and radio coverage of court proceedings.⁴⁴² While all matters relating to in-court media coverage are at the discretion of the court, the intention of the guidelines is to ensure that applications for in-court media coverage are dealt with expeditiously and fairly, and that, so far as possible, like cases are treated alike. The matters that the court may consider when considering an application from the media include:

- (a) the need for a fair trial;
- (b) the desirability of open justice;
- (c) the principle that the media have an important role in the reporting of trials as the eyes and ears of the public;
- (d) the importance of fair and balanced reporting of trials;
- (e) court obligations to the victims of offences;
- (f) the interests and reasonable concerns and perceptions of victims and witnesses.

MEDIA CONCERNS

7.5 In consultation with the Law Commission, members of the media raised a number of concerns about media access to court records, including:

- access problems arising out of the requirement that the media must have been in court before they can get information;
- delay in receiving responses to applications for material from the court record;
- inconsistency of treatment of requests by court staff, both within and between regions;
- diminished access as a result of an increasing trend towards the court receiving written material that is not read out;
- the costs of accessing the record – both photocopying and legal fees incurred in making access requests.

7.6 The New Zealand section of the Commonwealth Press Union (CPU) has also recently written to the Chief Executive of the Ministry of Justice to express concerns in relation to suppression orders.⁴⁴³ The Chairman of the CPU described two concerns:

- first, that judges impose too many suppression orders;
- secondly, that the orders are often made orally, particularly in the District Courts, and the efficiency with which the orders are transcribed and circulated varies widely from one registry to another.

⁴⁴¹ Ministry of Justice Guidelines for Staff, above n 440, page 10.

⁴⁴² Ministry of Justice, *The In-Court Media Coverage Guidelines 2003* (Ministry of Justice, Wellington, 2003). The guidelines set out how and when applications should be made, together with a standard application form. The standard conditions for television and radio coverage and still shots (describing what can and can't be shown if an application is granted) are appended as schedules to the guidelines. The guidelines apply to all proceedings in the Court of Appeal, High Court and District Courts as of 1 January 2004.

⁴⁴³ Letter from the Commonwealth Press Union to Belinda Clark, Chief Executive and Secretary for Justice, 9 December 2005.

- 7.7 The CPU suggest that suppression orders should be typed up as a matter of urgency, and that registry staff should post suppression orders relating to their particular court on the Ministry’s website, or send the details by email. We endorse this suggestion, insofar as it recommends posting on the website.

The requirement to be present in court

- 7.8 Media representatives perceived that access had become more difficult in the past 10 years. Whether or not the reporter had been in court, it used to be relatively easy to obtain simple information from court staff about matters such as who was appearing in court, what the charges were, the correct spelling of names, the dates of adjournments, and outcomes. Now, some media representatives say that court staff generally refuse to provide this information unless the reporter can confirm they have been in court during the hearing.⁴⁴⁴
- 7.9 Media representatives say it is a logistical impossibility to be in every courtroom in a region on any particular day. It is not uncommon for one court reporter to have to cover 16 courts on any one day. Only the Supreme Court and Māori Land Court calendars are presently available on the Internet. On-line court calendars and any advance listings were said to be of real value to the media in planning for deployment of resources. Other courts notify the public, including media, by “daily lists” published on a court noticeboard each day. These can be generated on CMS, although some registry staff prepare them manually, drawing on CMS material.⁴⁴⁵

RECOMMENDATION

R25 A reporter should not have to have been physically present in the courtroom in order to obtain copies of court records that were produced or relied upon in the open hearing.

Providing on-line information for the media

- 7.10 Providing on-line information has the potential to radically improve media access to court information, while also reducing the time spent by Ministry staff in handling such requests.
- 7.11 In chapter 5, we recommend that court calendars be made available on-line. Other information could usefully be provided on-line to the public as well. An example can be found in the media section of the South Australian courts website.⁴⁴⁶ The information provided includes case lists, directories of all court registries, media releases, the access rules for each court and template application forms, and a comprehensive media handbook. In other parts of the site, sentencing remarks are available on-line.

444 This is consistent with the advice contained in the Ministry of Justice Guidelines to staff. Many reporters complained about this policy. A *New Zealand Herald* reporter gave the example of going to a District Court criminal registry to make an inquiry about the precise charges and court-appearance dates of three people charged with assaulting children, in June 2004. In the past, such requests had normally been granted, but this time the reporter was advised that under the new guidelines, the media had no right to such information unless they were in court. The reporter was told she could make a written request to the court manager, who would refer it to the judge who was in court at the time.

445 Meeting with Dick Williams, National Business Advisor for CMS, Ministry of Justice, 20 July 2005.

446 Courts Administration Authority www.courts.sa.gov.au (last accessed 29 May 2005).

- 7.12 In New Zealand, the High Court website has begun to include judgments of public interest, and has, on occasion, included important District Court decisions on that site as well. This is an excellent development. We consider all courts should have a system of identifying decisions with high public importance or interest and put them on-line, subject, of course, to suppression orders.

Delay

- 7.13 Media representatives expressed strong concerns at the delays in obtaining a response to their requests under the rules for access to court records. Delays were often of several weeks or many months duration. By then, the information was no longer newsworthy.⁴⁴⁷
- 7.14 There is often tension between the timeframes the media face and the time frames in which the courts operate. The timeframes in which court staff operate are not driven by the same imperatives, and often there are conflicting demands on the staff resource.
- 7.15 Sometimes, delays cannot be avoided. An access request may require notice and time for a response, and the court must then find time to consider the request. The issue is really what amounts to an acceptable delay in responding to an access request. The media have complained of waiting weeks and sometimes months for an access request to be considered by a court. One court official suggested that, even where a request has to go to a judge, it should take only three or four days to get a decision.
- 7.16 The timeframes in which requests for access to court records must be considered and responded to should be set out in the proposed new access rules.

Inconsistency

- 7.17 Responses to requests for records were said to vary between court staff in a registry, as well as between different registries, courts and regions. There was a common perception that access was a matter of luck, dependent more on which staff member the media person encountered, or on their ability to develop a relationship with a particular staff member, than on any principled basis.⁴⁴⁸ However, positive as well as negative experiences were recounted, with more than one reporter giving examples of helpful assistance provided by court staff. Some courts ask or even require counsel to provide a copy of a particular document to the media. Such practices were praised by media representatives.⁴⁴⁹

⁴⁴⁷ In one example given, on 17 January 2005, a media commentator wrote to the District Court at Waitakere requesting a written decision and reasons given by the judge in a high-profile name suppression case. By 30 May 2005, the commentator had not yet received a response from the court, despite having telephoned three times and re-faxed the letter twice.

⁴⁴⁸ In one example, a *New Zealand Herald* reporter asked to see the file in the civil proceedings brought by a former police commissioner. The reporter was denied access, but a reporter from another paper saw limited parts of the file. The following day, after the story had been published in another paper, the *Herald* reporter was again denied access to the file. However, another member of the court staff overheard the exchange, and intervened, allowing the reporter access to the statement of claim and defence.

⁴⁴⁹ For example, the Wellington Coroner requires counsel to provide the media with a press copy of any documents filed. Reporters commented that this enabled accurate, timely and comprehensive reporting.

Handing in written material to court rather than oral presentation

- 7.18 There is an increasing trend in both civil and criminal cases for material to be placed before the court in written form, and for much of it not to be read out, despite the fact it is taken into account by the court in making its decision. Examples include expert witness statements, depositions and submissions. At a trial, documentary evidence will not normally be read out in full to the judge, though there may be references made to it during argument or in cross-examination. This trend creates serious practical problems for the media: material that would previously have been read aloud in open court is now not available to them, and trying to gain access to material through the court record rules during the hearing results in delays and can be costly, and the application may ultimately be unsuccessful.
- 7.19 As discussed in chapter 5, practices adopted by the courts and parties to ensure the efficient resolution of litigation should not be allowed to adversely affect the ability of the public to know what is happening in the course of the proceedings.⁴⁵⁰ Written material that features in proceedings in open court such as pleadings, affidavits, witness statements that have been confirmed and stand as evidence in chief and written submissions, should be regarded as documents that have been read in open court, and, subject to any statutory restrictions or confidentiality orders, the media should be given access to them once they have been produced into the court hearing.

Hand-up depositions

- 7.20 A particular area of frustration was the practice relating to hand-up depositions. These are written statements of evidence that are not read out in open court, but handed up to the judge or Justice of the Peace, to consider as part of the evidence of the case.⁴⁵¹ In most cases, hand-up depositions are used for reasons of convenience, rather than because the evidence is in any way confidential. However, because they are court records, media need to apply under the Criminal Proceedings (Search of Court Records) Rules 1974. Having to make an application for access may present problems for any reporter trying to produce a timely report of a criminal depositions proceeding.
- 7.21 In March 2001, the then Chief Judge of the District Court, Judge Ronald Young, issued a memorandum to all District Court judges, Justices of the Peace and community magistrates following complaints from the CPU about difficulties in obtaining access to hand-up depositions.⁴⁵² The memorandum noted:

The press ... fairly complained that given their need to report the whole of the evidence with regard to depositions, a subsequent application for a copy of the hand-up depositions hardly fits with the way in which they work. In the spirit of ensuring open justice I invite Judges and Justices of the Peace hearing depositions to immediately rule as each hand-up deposition is "handed up" on whether a copy of the deposition would be available to the press immediately.

⁴⁵⁰ *Barings plc (in liq) v Coopers & Lybrand* [2000] 3 All ER 910, at 919–920, per Lord Woolf MR.

⁴⁵¹ Section 173A of the Summary Proceedings Act 1957 does not require that deposition briefs be read out aloud, although the court has the power to require it.

⁴⁵² Memorandum of the Chief District Court Judge dated 22 March 2001.

- 7.22 In a covering letter to the CPU, the Chief Judge emphasised that this did not mean members of the press were entitled as of right to hand-up depositions, because there may be situations where the evidence is properly suppressed, or other reasons why it should not be publicly available.⁴⁵³ However, he anticipated that in the majority of cases, an order would immediately be made allowing the press a copy of the hand-up depositions. The Chief Judge described the current position as a “legislative lacuna which will need to be remedied”.
- 7.23 However, Justices of the Peace do not have jurisdiction under the Criminal Proceedings (Search of Court Records) Rules 1974 to grant access to documents relating to a criminal proceeding – leave of a judge is required.⁴⁵⁴ During our consultation, members of the media reported still encountering problems in accessing hand-up depositions. While some Justices of the Peace will release depositions on the strength of the Chief Judge’s memorandum, others take the view that the criminal search rules require them to refer applications to a judge. Given the wording of the criminal search rules, we have considerable sympathy for this cautious approach.⁴⁵⁵
- 7.24 Clearly, the present situation is unsatisfactory. In most cases, the media would have been able to hear the deposition had it been delivered in open court, as opposed to being handed up. There may, of course, sometimes be good reason to refuse access to a deposition, such as the risk of prejudice to a fair trial. (Hand-up depositions may contain prejudicial material subsequently excluded at trial.) But in the absence of suppression orders or other good reasons, why should the media have to apply for access to the material, rather than being entitled to it as of right?
- 7.25 The Criminal Procedure Bill 2004 proposes to introduce a new procedure for preliminary hearings, which will become known as “committal proceedings”.⁴⁵⁶ The purpose is to replace preliminary hearings with a standard committal procedure, which will not involve a hearing or consideration of the evidence. Written evidence will be handed to the court, and the defendant will be automatically committed for trial, without consideration of that evidence. This standard procedure would be followed unless a party is granted leave to orally examine a witness, in which case a committal hearing will be held.
- 7.26 In an earlier version, the Bill provided, that after a defendant was committed for trial, the court must allow an accredited news media reporter to inspect a copy of any formal written statement admitted at the standard committal or the committal hearing, or a copy of the record of any oral evidence taken, subject to any suppression order, and subject to a power retained by the court to order that access not be given, if the interests of justice so require.⁴⁵⁷

453 Letter from Chief District Court Judge, Judge RL Young to Commonwealth Press Union, dated 22 March 2001.

454 Criminal Proceedings (Search of Court Records) Rules 1974, r 5(b). We were given one example of access being denied on the express grounds of a lack of jurisdiction by the Justices of the Peace, but in other situations access was granted by Justices of the Peace after being shown Judge Young’s memorandum.

455 The Criminal Proceedings (Search of Court Records) Rules 1974, r 2(5)(b). Except as expressly provided in the rules, no one may search, inspect or copy the Crown Book or any file or document relating to a criminal proceeding without leave of a judge.

456 By substituting new Parts 5 and 5A of the Summary Proceedings Act 1957.

457 Criminal Procedure Bill 2004, Part 5, cl 184T.

7.27 When the Bill was reported back to the House at the end of July 2005, this clause had been deleted. The select committee commented:⁴⁵⁸

We do not consider that the media should have automatic access to written statements and records of oral evidence. For example, where a sexual violation complainant makes a formal statement in support of a committal, automatic access does not serve the intents of justice as such statements are untested.

7.28 The example used by the select committee contains two different possible objections to the media access provision: issues of sensitivity around cases involving matters such as sexual violation, and a more general concern that statements made for the purposes of preliminary hearings contain untested allegations. Under the draft provisions of the Bill, the court retained a power to order that access not be given to part or all of written statements or oral evidence given at the committal hearing. Thus, in cases such as sexual violation, the court could ensure there was no automatic access to that material.

7.29 The wider question, of whether it is appropriate to give access to statements containing untested allegations, raises issues of open justice. Preliminary hearings are now part of the open court process in New Zealand; media have been entitled to attend the hearings since about 1985. If a judge is concerned in a specific case that publicising untested allegations may influence a subsequent jury, these can be dealt with by an order in that case. There is no principled reason why, in general, media should not have access to the hand-up depositions, without which they may be hard-pressed to make sense of the proceedings.

RECOMMENDATION

R26 Justices of the Peace⁴⁵⁹ 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 Justices of the Peace are concerned that release might prejudice a fair trial, the matter should be referred to a jury-warranted judge for decision.

Costs

7.30 Wide variance was reported in the fees being charged by court officials. At \$5.00 per page, the junior reporter has to make on-the-spot decisions about what documents would be most relevant for the senior reporters to base their reports on.

7.31 When important matters of public interest are at stake and access is not given to court documents, media also have to pay what was described as “hefty” legal fees to argue for access to court records.

MEDIA LIAISON

7.32 Recently, the Ministry of Justice has made significant changes to its communication strategy, to ensure increased consistency of responses to media requests generally. Communications advisors have been appointed for the High Court and District

458 Commentary to Criminal Procedure Bill, as reported from the Law and Order Committee, 2005, 27.

459 For the avoidance of doubt, this power should be specifically extended to non-jury-warranted judges also.

Courts, and a media policy applicable to the whole Ministry of Justice has been circulated. The policy endeavours to ensure that frontline courts, tribunals and collections staff deal only with routine inquiries, such as requests for judgments and public documents and basic information like location and time of hearings. All other queries are to be referred to communications staff.

- 7.33 The policy will not directly affect access requests, which still need to be made to the registrar or judge where leave is required under the rules. However, it will enable the media to have a common point of contact where procedural difficulties arise, and will provide the Ministry with a “whole of ministry” perspective on media issues and concerns about access to court records. That should significantly improve both parties’ experiences of media access to records.
- 7.34 The Ministry is currently preparing a media handbook, which will be available on its website once completed. This document will be discussed with key media stake-holders before it is finalised.
- 7.35 As well as the Ministry of Justice’s communications advisors, there is a judicial communications advisor, who provides communications support to the judiciary, and information to the media and the public about the role of the judiciary.

ACCESS TO ELECTRONIC DOCUMENTS IN COURT

- 7.36 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.
- 7.37 Reporters advise that, in such cases, they typically do not have access to screens and this makes it very difficult for them to follow and report on the evidence. We consider 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 should be addressed at a case conference prior to commencement of the hearing or trial.

Chapter 8

Researchers' access to court records

- 8.1 None of the present court records rules gives any specific attention to researcher access. Researchers who need access to court records include:
- social science researchers employed by the Ministry of Justice's Research, Evaluation and Modelling Unit;
 - researchers under contract with the Ministry of Justice to undertake all or part of a research project;
 - researchers in other government departments, units or Crown entities;
 - academic researchers who may be lecturers, or their students;
 - private research organisations and independent researchers.
- 8.2 Researchers may be seeking access to case files that are still being litigated. They may be files to which the public has no right of access without leave, such as Family Court files. They could include documents with suppression orders on them. Researchers may also require access to criminal case files that contain a number of sensitive documents and can be subject to the Criminal Records (Clean Slate) Act 2004.⁴⁶⁰
- 8.3 Protection of individuals' privacy is a concern for research of case files, particularly where the research will be obtained or published by a government department subject to the Privacy Act 1993. The Privacy Act principles contain a number of exemptions allowing the collection or disclosure of personal information where the information will be used for statistical or research purposes and not published in a form that could reasonably be expected to identify an individual, or not used in a form that identifies an individual.⁴⁶¹ Schedule V of the Privacy Act 1993 allows access to particulars of persons who have been charged with an offence for . . . "obtaining information for the purpose of research conducted by the Ministry [of Justice], and with the limitation that information so obtained must not be published in a form that could reasonably be expected to identify the individual concerned".

⁴⁶⁰ Research access is covered by the Criminal Records (Clean Slate) Act 2004, s 19(3)(g).

⁴⁶¹ See the Privacy Act 1993 research exemptions in Principle 2(2)(g), Principle 3(4)(f), Principle 10(f) and Principle 11(g).

- 8.4 Typically, research by Ministry of Justice and other government department researchers is undertaken to assist the executive government in developing social policy to improve service delivery in particular areas.⁴⁶² It may also be undertaken for historical purposes. As this academic researcher has said:⁴⁶³

The statutes tell us what Parliament wanted the law to be; the law reports tell us what the judges said the law was; only court records tell us how the law worked in practice. The details of individual cases and litigants, as revealed by court records combine to give us a true social history of law.

PROCESSES TO OBTAIN ACCESS TO COURT RECORDS

- 8.5 There is no single process, publicly advertised, that all researchers wanting access to court records are obliged to follow. Many contact the Ministry of Justice, others make direct contact with courts or judges who then often refer the researchers to the Ministry of Justice.
- 8.6 Social science researchers employed in the Ministry of Justice Research, Evaluation and Modelling Unit are required to follow certain procedures where there is a need to access court records. The procedure is not, however, written down as a formal protocol.

Procedure for Ministry of Justice internal researchers

- 8.7 Once a project has a written proposal, it may often be considered by an advisory committee of key stakeholders and will usually be ethically reviewed by the Justice Sector Research Group. This group has representatives from the government departments such as the Police, Corrections, Child, Youth and Family Services and Social Development. There are also two academic representatives. It can only give advice, not approval. It meets at the Ministry to consider specific proposals, often with the researchers present to answer any questions.
- 8.8 After advisory committee and ethics advice has been incorporated into the project proposal, and the proposal is internally approved, the team leader will contact those whose permission is needed for access to records. Usually, this is the executive judges and court managers of courts whose records are sought, and often the principal judge of the relevant jurisdiction. Researchers are bound not to use names or other means of identifying individuals in any papers or reports, and by any other confidentiality or sensitivity assurances. Researchers on contract for the Ministry of Justice are subject to the same approval process.

Procedure for external non-Ministry of Justice researchers

- 8.9 Approximately five to 10 external researchers approach the Ministry of Justice each year with a request to access court records for research purposes. The Research, Evaluation and Modelling Unit asks the researchers to submit a proposal, which is assessed against written internal guidelines in terms of:

⁴⁶² Recent research involving access to court records included a study of status hearings in New Zealand undertaken by the Ministry of Justice's Research, Evaluation and Modelling Unit in conjunction with the Law Commission in 2002 to inform the Law Commission's preliminary paper on *Reforming Criminal Pre-trial Processes* (NZLC PP55, Wellington, 2004). Other studies that would require access to court records include evaluations of the restorative justice pilot in the courts, of the public defender pilot and of the Christchurch drug court.

⁴⁶³ Professor Jeremy Finn, email correspondence, 15 December 2005.

- background information (significance of the study, previous studies);
 - methodology (design of the study, subjects and data involved, sampling, data collections and analysis, cultural appropriateness, use of results);
 - objectives (aim of the study, information needs, specific tasks);
 - ethical considerations (informed consent, confidentiality assurances, effect of research on those studied, voluntary participation);
 - likely cost to the Ministry (some proposals may involve quite high time and resource input from court staff);
 - time tabling of the project;
 - information about main researchers and supervision of the project.
- 8.10 Ethics approval must usually also be obtained. Some government departments have their own ethics committees to vet research proposals before seeking Ministry of Justice approval. University researchers always need approval by the relevant university ethics committee.
- 8.11 The unit may ask the advice of the Ministry of Justice legal advisors, and possibly other specialists, before forwarding the proposal and an opinion on the research to the Ministry of Justice business unit concerned. The business unit asks the relevant courts if they are prepared and able to cooperate and can grant access. Judges' approval is sought where required by the search rules. The Head of the Bench concerned may be approached. The final decision on whether the Ministry of Justice will cooperate is made by the business unit.
- 8.12 The researcher will then be notified, and if the research is approved it will be subject to conditions. Typical ones are non-contact and non-identification of court clients, observation of privacy rights of persons named in court files, nothing from a court file is to be copied, the judges' notes are not to be used, only information relevant to the research is to be extracted. The approval process can take at least six weeks, often longer if a judge's leave is required. If approval is not given, researchers are informed that they can make an application to the court directly under the search rules.

Problems with the present process in New Zealand

- 8.13 There is no standard publicised entry point for applications to access court records for research purposes. While many non-Ministry of Justice proposals are assessed by the Research, Evaluation and Modelling Unit and submitted to the relevant business unit, other requests initially go to individual courts as do general public requests, and are considered by registrars or judges on an individual basis.
- 8.14 Anecdotal information suggests difficulties with the process in some cases. In one case, a doctoral student reported trying for many months to gain access to 23 High Court files concerning cases involving domestic violence and abuse of children needed for her thesis.⁴⁶⁴ The matter finally came before a judge who wrote to the accused and the Crown seeking approval for release of the file. Most defendants were either untraceable or unwilling to cooperate.

⁴⁶⁴ The research proposal was to study adult domestic violence cases and cases of mothers charged with domestic violence against children, paying particular attention to those mothers convicted of failing to protect their children against their partner's abuse.

The researcher eventually requested access to trial transcripts and sentencing notes for four accused.⁴⁶⁵ The judge granted access to the trial transcripts (as clearly covered by the Criminal Proceedings (Search of Court Records) Rules 1974) on the researcher's undertaking that anonymity was guaranteed.⁴⁶⁶

- 8.15 For internal Ministry of Justice researchers, there is a fairly rigorous standard procedure and protocol applying to research projects, including any court record-related research, but this process does not appear to be documented. For non-Ministry researchers who contact the Research, Evaluation and Modelling Unit, the internal guidelines for assessment and approval require a clearly articulated, ethically considered and well-supported proposal. However, these guidelines are informal and not publicised. Judicial approval is necessary when required by the search rules (which are not always clear as has been seen), and if it has been required this can cause significant delay.
- 8.16 If researchers go directly to courts as members of the public and are not referred to the Research, Evaluation and Modelling Unit, this can cause considerable delays. This route also fails to highlight, at an early stage, the importance of the maintenance of the confidentiality of persons named in court documents. Because this is a general condition imposed on approvals, it should be made known to researchers as soon as possible, together with other standard conditions.

ACCESS TO
COURT RECORDS
LODGED IN
ARCHIVES
NEW ZEALAND

- 8.17 Under the Archives Act 1957, requests for archived court records needed approval from the courts involved. An academic professor doing research recently requested access to court records of the 1850–1875 period held at National Archives.⁴⁶⁷ He was granted access eventually, after satisfying Archives' staff that the court registrars of the relevant court had no objections. The relevant registrars agreed to access, but only on confirmation that the research would not infringe the privacy interests of any living person. The researcher suggested that Archives New Zealand should have the discretion to allow access where it was clear that no such interest could be affected.⁴⁶⁸ We have been told of other anecdotal evidence where significant delays were experienced accessing documents from National Archives; in one case it seems that complying with a request to copy judgments and orders in two court files, amounting to over 60 pages in length, would take 20 working days.
- 8.18 Under the Public Records Act 2005, open access records are available to the public from Archives New Zealand on request at no charge except for research, copying or other services provided in relation to a request for access. Some public records, however, are to be classified as "restricted" either for a period or upon conditions. Section 48 provides that the Chief Archivist may give written authority for the publication or copying of a public archive that is an

465 The Crown had no objections to access so long as suppression orders made by the court were adhered to. However, two of the accused were not traced and one had died.

466 *Under the Criminal Proceedings (Search of Court Records) Rules 1974 in the matter of G, M, H & T* (16 December 2004) HC WN, Ronald Young J. The judge held that the sentencing remarks were not covered by the search rules but were essentially a judgment and available as of right.

467 National Archives is now known as Archives New Zealand since the Public Records Act 2005 came into force.

468 The same researcher complained of the unreasonable delay in getting access to "judges' notebooks". However, judges' notebooks are not archived by the courts because they have never been considered to be part of the court record. The particular set of books appears to have been sent to Archives in error.

open access record. We are concerned about this section if it means, as it appears to mean, that publication involving archived records always involves permission by the Chief Archivist. Information in open access records that have been archived is public information, and there seems no reason why such information should not be publishable without permission (unless there are copyright issues).

SOME OVERSEAS MODELS

England

- 8.19 The Department of Constitutional Affairs' (hereafter the department) Research Unit controls department-funded researchers' access to court records and acts as the point of contact for non-department funded researchers.⁴⁶⁹ The Research Unit designs, commissions, manages and conducts research; provides research based briefing and advice; publishes and distributes reports on department-funded research; and coordinates requests for access to the courts and court records for non-department funded researchers. Written, publicly accessible guidelines about applying for access are available on the departmental website.⁴⁷⁰
- 8.20 The Research Unit has seven researchers who undertake research for the department. In addition, the unit has links with other governmental research offices (for example, the Home Office, which has about 200 researchers), who contribute to, or collaborate on, research that has overarching policy interests. The Research Unit also deals with requests from academics and other research bodies who need access to court records for research purposes.⁴⁷¹

*Processing a research access-to-court-records request*⁴⁷²

- 8.21 The unit requires professional external researchers to provide their CVs and proposals, which will quite often have been quality checked by their own ethics committee, all of which must meet governmental research ethics standards. This includes a "diversity requirement", to ensure that the research does not discriminate against anyone in terms of race, age, ethnicity, sexual orientation, or disabilities.
- 8.22 As in New Zealand, any request for privileged access to court files would have to include the details of the researcher; the organisation or body on behalf of which the research project was to be carried out; details of what was intended to be done with the data obtained; sample size and a methodology setting out how it is proposed to carry out the project, including courts to be visited, how to minimise inconvenience to court staff, details of numbers of court files intended to be searched, and length of time of intended court visits.

469 Her Majesty's Courts Service www.hmcourts-service.gov.uk/aboutus/inforesearch (last accessed 12 April 2006).

470 Department of Constitutional Affairs www.dca.gov.uk/research/access.htm#part3 (last accessed 12 April 2006).

471 Only requests from bona fide researchers are considered. A request from the media, for example, would be referred to the Press Office.

472 Much of this information was obtained by a Law Commission researcher in discussions with Carole Burry from the Department of Constitutional Affairs' Research Unit in 2005.

Researchers also need to explain the public benefits of their proposed research, and to identify the files that relate to the matter they want to research. Proposals must state the use to which the study will be put.⁴⁷³

- 8.23 For internally commissioned projects, the researchers tendering for the contract must agree a methodology with the department as part of the tendering process, and the Research Unit will have obtained the agreements to the proposed methodology before putting it in the contract. There is no “vetting committee” as such, nor an ethics committee.
- 8.24 A Data Approval Panel has been set up since the creation of Her Majesty’s Courts Service, which looks at all data access requests that relate to court files and systems, from a “business” point of view, before they are passed to the Research Unit and records management services team for final approval.
- 8.25 Some proposals do not have adequate information and an exchange of correspondence (very likely by email) may ensue until the application is ready to be considered for approval status.⁴⁷⁴
- 8.26 When a privileged access request has reached the stage of a full detailed proposal, the Research Unit first consults the policy divisions of the Department of Constitutional Affairs to make sure the research is factually sound and not duplicative. The Research Unit then contacts all the relevant operational divisions of the department from which permission to allow the access requested must be sought, to establish that the research is feasible and will not unfairly burden court staff. The unit coordinates the responses, and liaises with the researchers. Senior judicial approval may then need to be obtained.

Privileged access agreements

- 8.27 When a project is approved, before any access is allowed, a “Privileged Access Agreement” must be signed by the researchers and any research assistants (that is, anyone who will have access to the data being collected) if the research involves looking at court files or recording other restricted information. The privileged access agreement is a binding agreement between the researchers and the department that all information collected will be fully anonymised to protect court users’ privacy, and other safeguards will be met.
- 8.28 Privileged access agreements also include clauses relating to (a) researchers not being permitted to publish anything using or arising from Department of Constitutional Affairs data, until proof-read and approved by the Research Unit; and (b) only being permitted to use the data for the stated project. The approval process can take at least 13 weeks.

⁴⁷³ Proposals often lack the requisite detail. Researchers usually need to provide further information to the Research Unit and the unit may need to set up a meeting, for example, because the research proposal is too vague or broad and says merely that researchers will “look at files”. To allow researchers to search for records of the types of file in which they are interested, and then obtain the files from the storage area for themselves, would put the Department of Constitutional Affairs in breach of the Data Protection Act 1998 (UK), because this would allow access to data other than that covered by the research project.

⁴⁷⁴ It is possible to do a feasibility study as to whether a proposed project is viable; an access agreement is still necessary for such a study.

Impact of relevant legislation

- 8.29 The department is subject to the Data Protection Act 1998 and the Public Records Acts 1958 and 1967. The Data Protection Act 1998 does not prevent disclosure of data for legitimate research purposes.⁴⁷⁵ Nor do the Public Records Acts (1958 and 1967)⁴⁷⁶ prevent access, if for bona fide projects.
- 8.30 The Freedom of Information Act 2000 does not provide any right of access to court files under 30 years old, because court files are exempt from the access provisions. However, as from 1 January 2005, if a file is to have its closure period extended, it is under the exemptions provisions of the Freedom of Information Act, rather than under the Public Records Acts.

Scotland

- 8.31 Researchers contracted to the Scottish Executive, and independent researchers requiring access to the judiciary, must comply with certain protocols, and if they require permission to enter courts to search records they must also approach the senior judges in the area.⁴⁷⁷
- 8.32 The Scottish Executive access guidelines state that: “Research requiring access to information . . . should be approached with the same ethical prudence as that which entails interaction with individual respondents themselves”. Researchers are referred to the constraints on the way information is accessed in the Freedom of Information Act 2000. It is further noted that it may be necessary for some tenderers to get ethical clearance from their departmental or professional body and this will take time.

Canada

- 8.33 The *Model Policy for Access to Court Records in Canada*⁴⁷⁸ has a section on “extended access” to parts of court records that would otherwise be restricted. In deciding whether access should be granted, the following criteria are to be taken into account:
- (a) The connection between the purposes for which access is sought and the rationale for the constitutional right to open courts.

475 Research is, in fact, one of the purposes listed in the department’s Data Protection Act Notification, for which personal data is processed.

476 The Lord Chancellor has general responsibility for the care and preservation of public records (Public Records Act 1958, s 1) and is also responsible for the public records of every court of record or Magistrates’ Court which are not in the Public Record Office or place of deposit appointed by him (Public Records Act 1958, s 8). Note that public records in the Public Record Office are not available for inspection until they have been in existence for 30 years: Public Records Act 1967, s 1.

477 Information concerning access protocols for researchers’ access to court records sent by email attachment dated 26 May 2005, from the Legal Studies Research Branch of the Scottish Executive. A typical letter to a Sheriff Principal sets out the research proposal in summary and then states what this will entail. If a search of court records is involved, the letter lists what documents would need to be considered and analysed. The letter would then request the Sheriff Principal’s agreement for the research team to contact the sheriff clerks in order to access court files. The estimated time this would all take should also be stated, and an undertaking given that the researchers will respect the confidentiality of case files so that it would not be possible to identify people.

478 *Model Policy for Access to Court Records in Canada* prepared by the Judges Technology Advisory Committee, approved by the Canadian Judicial Council, September 2005, para 5.1.

- (b) The potential detrimental impact on the rights of individuals and on the proper administration of justice, if access is granted.
 - (c) The adequacy of existing legal or non-legal norms, and remedies for their breach, if improper use is made of the information contained in the court records to which access is granted. This includes, but is not restricted to, existing privacy laws and professional norms such as journalistic ethics.
- 8.34 The discussion notes that such requests will typically be made by individuals with a professional interest in accessing court record information, such as journalists, academics and researchers, but the policy would apply to any member of the public. If granted, extended access would typically be governed by an “access agreement”. Such an agreement “may include terms and conditions primarily designed to minimize the risks that extended access will be used to undermine the privacy and security rights of individuals or the proper administration of justice”. Such conditions could provide for rights and obligations of users and fees. If remote access to case files is granted, a provision prohibiting bulk downloading might be included.

United States

- 8.35 There do not appear to be any rules or written protocols specifically for researchers' access to court records.⁴⁷⁹ Researchers are members of the public, so researchers have the same access as do the public. Access rights vary according to whether records are restricted (containing confidential information) or unrestricted. For unrestricted records, there is total public access and researchers have the same rights as any member of the public.
- 8.36 For confidential information, the *COSCA Guidelines for Public Access to Court Records* allow requests for “bulk distribution” of information in court records that is not publicly accessible for a number of purposes, including research, and subject to the requester meeting certain conditions.⁴⁸⁰ The requester must identify what information is sought and the purpose for requesting it. The requester must also explain how the information will benefit the public interest or public education, and what provisions are made for the secure protection of any information obtained where access is restricted. The court must then consider the request and may grant it if satisfied that it meets the criteria established by the court and is consistent with the court's access policy; that the resources are available to compile the information; and that it is an appropriate use of public resources.
- 8.37 Washington state family law rules provide:⁴⁸¹

The court shall allow access to restricted documents, or relevant portions of restricted documents, if the court finds that the public interests in granting

⁴⁷⁹ Information on the situation in the United States, particularly in the state courts, was provided by Karen Gottlieb, an American attorney and state court consultant. Dr Gottlieb has conducted research on privacy and public access issues in the United States state courts.

⁴⁸⁰ MW Steketee and A Carlson *Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts* (2002) SJI, National Center for State Courts and the Justice Management Institute (18 October 2002) 4.3(b), www.courtaccess.org/modelpolicy (last accessed 16 October 2005).

⁴⁸¹ Access to Family Court Records, General Rule 22, see www.courts.wa.gov/court-rules (last accessed 1 March 2006).

access or the personal interest of the person seeking access outweigh the privacy interests of the parties or dependent children. If the court grants access to restricted documents, the court may enter such orders necessary to balance the personal privacy interests of the parties or dependent children with the public interest or the personal interest of the party seeking access, consistent with this rule.

Summary

- 8.38 Generally, it seems from the jurisdictions we have considered for this report that, where court records are restricted or not accessible “as of right”, there are processes and protocols that researchers need to follow in order to obtain permission to search and access court records. They will need to prove their bona fides and appropriate qualifications, and produce a proposal with a sound methodology and clear indication of what they need to access that will not impact too heavily on court staff resources. Often, ethics committee approval will be necessary. Generally too, researchers will be required to undertake that the confidentiality of persons named in court files is preserved and that the product of their research is anonymised so that these people cannot be identified in any way.
- 8.39 Of the jurisdictions we researched, England has the most specific and clearly documented procedure, which is publicly available, for researchers wanting access to court records. It is an English model that we recommend for New Zealand.

RECOMMENDATIONS 8.40 We are of the view that New Zealand needs a single entry point for all requests for access to court records by researchers. The process to be followed and the criteria upon which all research proposals will be considered needs to be fully articulated and published.

8.41 We consider that a committee of persons experienced in research and court records management should be established by the Ministry of Justice to consider all research proposals. This committee should have the final say (after consultation with the judges) on whether access is granted, and under what conditions. The process should be managed and supported by the Research, Evaluation and Modelling Unit.⁴⁸² Proposals should be assessed in terms of their methodology and feasibility, their anticipated contribution to the public good, their likely impact on court time and other resources. Where courts or judges are approached by external researchers seeking access to court records they should always be referred to the committee.

8.42 Our recommendation is that this committee should develop guidelines similar to those informally followed at present, and to those published by the Department of Constitutional Affairs in England, for all researchers requiring access to court records.

8.43 A research proposal that requires access to court files should include:

- the details of the researchers’ skills and qualifications and the organisation or body on behalf of which the research project was to be carried out;

482 The committee could also consider proposals requiring access to any Ministry of Justice unit record data, staff resources and so on.

- the aim of the study, the issue to be investigated, specific research questions and details of what is intended be done with the data obtained;
 - the significance of the study and the use to which the study will be put; the public or other benefits of the proposed research;
 - sample size, and a methodology setting out how it is proposed to carry out the project, including courts to be visited, how to minimise inconvenience to court staff, details of the category and number of court files it is intended to search, and length of time of intended court visits, and data analysis method;
 - approval (generally at a later stage) by the organisation's ethics committee of details of method of ensuring confidentiality of people named in files, and any other ethical and cultural issues.
- 8.44 A standard "privileged access agreement", similar to the one used in the England, could be drawn up to formalise access once agreement to it is reached. The agreement should specify what the researchers are allowed to access, where from, and precisely what they can or cannot do with it. This should also be published. Researchers should only be granted access after they have entered into such an agreement, which must be signed and witnessed. Its terms and conditions should be aimed at giving maximum protection to the privacy and security of persons named in court records and court users, minimising the potential detrimental impact on the rights of individuals, if access is granted, and ensuring the proper administration of justice is not undermined.
- 8.45 Although the Research, Evaluation and Modelling Unit does some of this work already, the proposed new procedure would require additional resources to establish the committee, prepare the documentation, and for ongoing administration and support of the committee.
- 8.46 Researchers applying for access to Archives New Zealand should be made aware of what they can access, the process for applications and the length of time it will take, and (at present it seems) that any publication using these records requires the prior approval of Archives.⁴⁸³ There should be a process of limited approved access to restricted court records in Archives,⁴⁸⁴ providing researchers fully anonymise any reference to these records, and there is compliance with any access agreements.

RECOMMENDATION

R27 New Zealand needs a single entry point for all requests for access to court records by researchers. The process to be followed and the criteria upon which all research proposals will be considered needs to be fully articulated and published.

483 However, we suggest that this provision be amended.

484 Section 19(3)(g) of the Criminal Records (Clean Slate) Act 2004 could apply once approval is given by a government department. Section 17 of the Act would apply too, so that publication of any criminal record or information about the criminal record of a "clean-slatted" individual would be an offence.

RECOMMENDATION

- R28 A committee of persons experienced in research and court records management should be established by the Ministry of Justice to consider all research proposals. This committee should have the final say on whether access is granted, and under what conditions. The process should be managed and supported by the Research, Evaluation and Modelling Unit.⁴⁸⁵
- R29 This committee should develop guidelines similar to those informally followed at present, and to those published by the Department of Constitutional Affairs in England, for all researchers requiring access to court records.

RECOMMENDATION

- R30 A research proposal that requires access to court files should include:
- the details of the researchers' skills and qualifications and the organisation or body on behalf of which the research project was to be carried out;
 - aim of the study, the issue to be investigated, specific research questions and details of what is intended be done with the data obtained;
 - the significance of the study and the use to which the study will be put; the public or other benefits of the proposed research;
 - sample size, and a methodology setting out how it is proposed to carry out the project, including courts to be visited, how to minimise inconvenience to court staff, details of the category and number of court files it is intended to search, length of time of intended court visits, and data analysis method;
 - approval (generally at a later stage) by the organisation's ethics committee of details of method of ensuring confidentiality of people named in files, and any other ethical and cultural issues.

⁴⁸⁵ The committee could also consider proposals requiring access to any Ministry of Justice unit record data, staff resources and so on.

Chapter 9

Archive practices

9.1 The terms of reference ask the Law Commission to advise what principles and rules should govern the archiving of court records and access to court files and records that have been transferred to Archives New Zealand (previously known as National Archives).

PUBLIC RECORDS ACT 2005

9.2 To some extent, this reference has been overtaken by the passage of the Public Records Act 2005, which was enacted in April 2005, repealing the Archives Act 1957 and the document and archive provisions of the Local Government Act 1974. In chapter 5, we set out our proposals for how requests for access to case records should be treated in the period after transfer of court records to Archives New Zealand. We consider that this policy approach can be accommodated within the provisions of the Public Records Act.

9.3 This chapter discusses the new legislation, and describes current archive practices in the New Zealand courts. It also briefly considers the model operating in the United Kingdom, which takes a centralised approach to archiving court records and limiting disclosure of any sensitive material they may contain.

9.4 The focus of the Archives Act 1957 was on preservation of records of long-term value. There was no express obligation to create and maintain those records – it was assumed that they would be created. While preservation remains one of the purposes of the Public Records Act, a core provision of the new Act is a requirement for all public offices to create and maintain full and accurate records.⁴⁸⁶

Mandatory transfer of public records

9.5 Every public office must transfer public records that have been in existence for 25 years to the possession of Archives New Zealand or an approved repository, and the control of the Chief Archivist. There are exceptions to this rule: where documents are to be destroyed in accordance with the provisions of the Public Records Act 2005, or where there is written agreement between

⁴⁸⁶ Public Records Act 2005, s 17. The standard is in accordance with normal prudent business activity. The Act applies to all “public offices”, namely all government organisations, including the legislative, executive and judicial branches of government, and their agencies. The definition of “public office” in section 4 of the Act includes departments as defined in section 2 of the State Sector Act 1988. This includes the Ministry of Justice.

the administrative head of the public office and the Chief Archivist as to earlier transfer, or if transfer is deferred under the Act.⁴⁸⁷

ACCESS TO COURT RECORDS UNDER THE ARCHIVES ACT 1957

- 9.6 The access rules applying to civil records in the High Court and District Courts provide that, subject to statutory restrictions and court orders, access to records will be presumptively restricted after six years, and open again after 60 years.⁴⁸⁸ However, these provisions were overridden by the Archives Act 1957, which required mandatory transfer of records after 25 years, and, subject to any conditions imposed by a judge, provided for public access to those records at the time they were deposited.⁴⁸⁹
- 9.7 In relation to criminal records, under the Archives Act 1957, information relating to trials could only be inspected by a person authorised to do so by the Minister of Justice,⁴⁹⁰ despite the fact that the Criminal Proceedings (Search of Court Records) Rules 1974 provided for open access after 60 years. Similarly, information relating to the punishment of a person could only be inspected with the permission of the minister responsible for Corrections. Such requests were referred to the relevant minister and access granted only once authorisation was confirmed.
- 9.8 In 2003 the then National Archives negotiated an access protocol with the Department for Courts (now Ministry of Justice) about which types of court records were accessible, and which were subject to restrictions. This protocol did not apply to the Court of Appeal, tribunals or the coronial jurisdiction.
- 9.9 As a result of dialogue with courts, Archives New Zealand was made aware that some categories of document, such as the Crown Books, registers and indexes were open to public access.⁴⁹¹ If they received a request to access a court file that was subject to restriction, they continued to refer the request to the Ministry of Justice for the minister's approval.
- 9.10 With the passage of the Public Records Act 2005, existing access restrictions for records already transferred to Archives New Zealand were transitioned, and remain in force until the withdrawal or expiry of the restriction. Thus, for existing records, applications for access to trial records continue to be referred to the minister, a situation Archives New Zealand describes as not ideal.

ACCESS CLASSIFICATIONS UNDER THE PUBLIC RECORDS ACT 2005

- 9.11 The process for classifying records on transfer to Archives New Zealand is one of the major changes under the Public Records Act in terms of archiving of court records. Previously, the provisions of the Archives Act 1957 were considered to override all other rules. Under the Public Records Act 2005, the administrative

487 Public Records Act 2005, ss 21, 22.

488 High Court Rules, r 66(12).

489 Archives Act 1957, ss 8, 14, 20.

490 Archives Act 1957, s 20(1)(c).

491 Since the enactment of the Criminal Records (Clean Slate) Act 2004, there are restrictions on access to these registers and indexes.

head of a controlling public office now must make access classifications for all records when they are 25 years or older, or when they are about to be transferred to the control of the Chief Archivist.⁴⁹² Records will be either open access or restricted access records.

- 9.12 In classifying the access status, the administrative head must consider whether there are good reasons to restrict public access, having regard to any relevant standard or advice issued by the Chief Archivist, or whether another enactment requires the public record to be withheld from public access. If neither of those bases for restriction applies, a public record must be classified as an open access record.
- 9.13 Open access records will be available to users on request, wherever the records are held. The Act provides for free inspection of an open access record to members of the public.⁴⁹³ However, the Chief Archivist may charge for research, copying or other services provided in relation to a request for access to a public archive.⁴⁹⁴
- 9.14 If a person wants to challenge an access restriction imposed on a court record, they can complain to the Office of the Ombudsmen under the Ombudsmen Act 1975. (Complaints about access to other documents that are subject to the Official Information Act 1982 or the Privacy Act 1993 would be dealt with under those statutes.)
- 9.15 Our recommendations as to the classifications that should be imposed on court records on transfer to Archives New Zealand are set out in chapter 5. We do not intend that these recommendations should alter the current arrangements for destruction of court material, and assume that similar arrangements to those set out in the current disposal schedules will continue. While the schedules are not currently comprehensive, it is possible to predict that a lot of material held on case records will be disposed of without needing to be archived, while more significant material will be retained.

DESTRUCTION AND ARCHIVING OF COURT RECORDS

- 9.16 Previously, the Archives Act 1957 provided that no public archives of any court of record could be deposited in Archives, or be destroyed or disposed of under the Act, except with the prior approval of a judge.⁴⁹⁵
- 9.17 The Ministry of Justice operates a decentralised case filing system. This means that, at a regional level, each court is responsible for creating and maintaining its own files, and for retention, disposal and archiving of inactive files. The typical practice has been that court staff at regional levels prepare a schedule listing court records that are to be destroyed or archived. These are reviewed and ultimately signed off by a judge. The schedule is prepared according to file management guidelines. The most recent guidelines indicate that archiving and

⁴⁹² Public Records Act 2005, s 43.

⁴⁹³ Public Records Act 2005, s 47.

⁴⁹⁴ Public Records Act 2005, s 59.

⁴⁹⁵ Archives Act 1957, s 14.

retention should be in accordance with the Courts Disposal Schedule agreed between the Department for Courts and Archives New Zealand.⁴⁹⁶

- 9.18 The Courts Disposal Schedule provides instructions as to whether files should be transferred to Archives New Zealand or can be destroyed. In most cases, the schedule indicates records should be transferred after 10 years, but individual courts may hold records for longer periods than set down in the schedule before transferring them.⁴⁹⁷ However, registers and indexes of criminal cases in the District Court must be retained and transferred to Archives New Zealand.
- 9.19 The Courts Disposal Schedule provides for retention of “significant files” from among those that would otherwise be destroyed.⁴⁹⁸ These might be files that are significant in terms of legal precedent or case law, or highly publicised cases that have received national media coverage.⁴⁹⁹
- 9.20 The Public Records Act 2005 provides for disposals authorised under the Archives Act 1957 to continue in force until their expiry date. The expiry date for the Courts Disposal Schedule is 31 December 2009. There is presently some confusion, however, as to whether the schedule was validly approved under the Archives Act 1957, which may impact on the transition provisions. The Ministry of Justice is currently seeking advice on this issue.

ARCHIVING COURT RECORDS – CURRENT PRACTICE

Supreme Court

- 9.21 At the moment, all Supreme Court files are retained. There has been no decision as to how long they will be held and which if any will ultimately go to Archives New Zealand.

Court of Appeal

- 9.22 The Court of Appeal generally keeps records on site for 10 years, before archiving all material. (At present, they have records going back for the past 11 years.) More current files (those two to three years old) are held in the registry office, the remainder are stored in the basement.

High Court

- 9.23 If there is no question of an appeal, High Court files are generally archived in the court basement for 10 years. Some may be kept longer (for example,

496 High and District Court Civil File Management Guidelines, and High and District Court Criminal File Management Guidelines, Department for Courts, March 2000. The Courts Disposal Schedule was finalised in 2003. It specifically excludes summary criminal record sheets in the District Court. It was intended that these should be covered under a separate schedule, but as yet no such schedule has been agreed. A separate agreement was negotiated for the Court of Appeal in 2002, but this has expired and has not yet been replaced.

497 For example, in the District Courts, case files in civil cases can be destroyed when all legal, financial and administrative requirements have been met. A similar rule applies to criminal case files in the District Court, with the exception of “significant cases”.

498 Courts Disposal Schedule, para 3.10.

499 Examples given include papers associated with cases such as Bastion Point, murder, aggravated assault and other major criminal or civil cases. Cases relating to town planning and under the Resource Management Act 1991, are described in the Schedule as also likely to be worth retaining as archives. Ultimately, which cases are retained as significant will depend on the judgement of court officials.

probate files) depending on storage capacity. Eventually, all files except chattels security files should go to National Archives. The High Court at Wellington advises that there has been no significant archiving of High Court files in the last 10 to 15 years.

- 9.24 Notes of evidence are kept on the files, but once a matter is determined, exhibits are not retained.

District Court

- 9.25 In relation to criminal files, the Wellington District Court advised that records of all jury trial cases are kept, in accordance with the Courts Disposal Schedule. They can be archived after 10 years, but the Court is very behind with archiving. Summary and Youth Court files are usually disposed of after 10 years – only the “criminal record” and the information is kept. About three or four “significant files” are kept, usually large ones. As far as possible, exhibits are returned, not kept on the file.

- 9.26 As for civil files, the Wellington District Court indicated that most files are usually kept for 10 years. Some may eventually be sent to Archives New Zealand.

Family Court

- 9.27 The Family Courts in both Wellington and Auckland indicated that all files are archived eventually. The Court at Wellington noted that files are not kept for a particular time before being archived, but just until the storage rooms in the Court are full. Files are kept in the Court for as long as possible, because a number are re-opened, especially guardianship files. Currently, they go back to 1988.

Māori Land Court

- 9.28 The issues around archiving in the Māori Land Court have been mentioned previously. Concerns have been raised by Māori about access to the information and knowledge contained in the Māori Land Court records, and ownership and custody of the records. The Minute Books up to 1975 have been transferred to Archives New Zealand, but the Block Order books have not, the Māori Land Court having taken the view that the registrars and the Court were the custodians of those records. Currently, no records are being transferred to Archives New Zealand.

- 9.29 A Māori Land Owners’ Consultation Forum has been established, among other things, to provide an opportunity for Māori to have input into decisions concerning the operational policies affecting access to Māori Land Court records, and archiving of those records in the longterm, including:

- providing advice on records preservation and archiving policies for the historical Māori Land Court record;
- providing advice on preservation policies for other Māori Land Court paper records and for the electronic records;
- investigating the possibility of Māori being responsible for preservation and storage of the historical court records and, if this does take place, the process by which this should occur, including the standard of archiving and preservation facilities that will be required.

- 9.30 Under the Public Records Act 2005, the Minister may approve a body to be a repository where public archives may be deposited for safekeeping.⁵⁰⁰ Examples of relevant bodies given in the Act include museums, libraries, and iwi- and hapu-based bodies. The Chief Archivist may impose standards or conditions on an approved repository for the purposes of ensuring that the public archives are properly maintained, and appropriate public access to the public archives is maintained. It may therefore be possible for an iwi to be approved as a repository for records currently held by the Māori Land Court.

Environment Court and Employment Court

- 9.31 Retention and disposal schedules have been agreed with Archives New Zealand for the Employment and Environment Courts. Files are kept for 10 years before being archived or destroyed.

RECORDS MANAGEMENT IN ENGLAND – THE DEPARTMENTAL RECORDS OFFICER

- 9.32 In England, the courts have developed a particular model to deal with the archiving of court records, which is worth noting, because it allows sensitive material to be identified and classified before transfer. Records that were freely available to the public before their transfer to National Archives remain open after transfer, and other records become available for public inspection when they reach the age of 30 years, or such other age as the Lord Chancellor prescribes.⁵⁰¹ Responsibility for carrying out duties imposed on the Department of Constitutional Affairs under the Public Records Act 1958 has been centralised, with the establishment of a departmental records officer. This officer is responsible for ensuring that records are opened after 30 years, or where appropriate, that they are closed for an extended period or retained in the department.
- 9.33 The Lord Chancellor will give approval for records to be closed for an extended period on the recommendation of the departmental records officer and after consultation with National Archives, provided they meet the criteria laid down in sensitivity guidelines issued by the National Archives. These guidelines provide that files and other records containing sensitive information, such as medical and pre-sentence reports, information on minors and rape victims, will normally attract closure periods of 40 to 100 years, depending on the age, degree of sensitivity and substantial distress likely to be caused to those involved should the records be accessible.⁵⁰²
- 9.34 An example of how the system works can be found in the Crown Court. The Crown Court Manual specifies which documents will constitute the permanent record of the Crown Court for various types of cases.⁵⁰³ Local court managers are responsible for the selection of records for permanent preservation, and for the destruction of the remainder. Court managers review trial files when they are seven years old, and make a provisional selection for permanent preservation. These files are sent to the Records Store, where the departmental

500 Public Records Act 2005, s 26.

501 Crown Court Manual, section 30, Requests for Information, April 2005, para 8.1.

502 Since 1 January 2005, requests for information in court records transferred to the National Archives will be dealt with on a case-by-case basis, in accordance with the provisions of the Freedom of Information Act 2000. Cases that contain sensitive material are likely to remain closed because exemptions in the Freedom of Information Act will apply.

503 Crown Court Manual, section 31, Records Management, April 2005.

records officer makes the final selection of cases for permanent preservation. Files not selected for preservation are destroyed.

- 9.35 Certain categories of files must be selected for preservation. Many of these are similar to the type of files that are considered significant in New Zealand.⁵⁰⁴ A representative selection of case files (no more than two or three per category) must also be preserved to show a wide variety of cases.
- 9.36 At the point at which the departmental records officer makes the final selection of files for preservation, the files are “cleaned up”, with sensitivity checks for the kind of documents described above, which might require closure of the file for an extended period. Items such as videos or CD ROMs of CCTV footage, and audio tapes of court hearings, are not retained. The exercise is one of balancing what should be retained for posterity against the protection of personal information and privacy.
- 9.37 Similar arrangements exist in the other higher courts in the United Kingdom system. Records from the High Court (Admiralty, Chancery and Queen’s Bench divisions) that are of local or historical interest must be retained for 30 years, before being transferred to the departmental records officer for review, and then archiving. The remainder are destroyed, seven years after the date of the last paper in the case of Queen’s Bench files, and 10 years in the case of Chancery and Admiralty files.
- 9.38 In the lower courts (County Courts and Magistrates’ Courts), most court records are destroyed after being held at the court for a specified number of years (from as little as one to as much as 100, depending on the nature of the record). A very few (such as records from before 1850), may be offered to the local records office.

504 Crown Court Manual, above n 503. Files that must be selected for preservation include: files where there is a charge of murder, manslaughter, infanticide and child destruction; charges under the Official Secrets Act, treason, treachery and sedition; trials involving persons connected with the IRA or other terrorist organisations, matters of public concern such as riots; trials that are of general or historic interest, or were of public interest at the time or prominently involved eminent or notorious persons; cases referred to in the Sex Offenders Act 1997 where the notification period exceeds five years, and any other files where the sentence was longer than seven years.

Chapter 10

Fees

- 10.1 Fees for searching and copying records relating to particular judicial proceedings are prescribed by various court fees regulations.⁵⁰⁵ There is some consistency between the fees set for different courts and types of proceedings. But the regulatory regime is complicated. It is incomplete, its relationship with the court rules and statutes is unclear, and the principles upon which the fees are based are not obvious.

CURRENT RULES AND PRACTICES Court record search and copying fees

The regulations – criminal proceedings

- 10.2 The Criminal Proceedings (Search Fees) Regulations 1997 list the fees in the schedule for searching and copying the records of indictable proceedings under the Crimes Act 1961. These fees apply to proceedings in the Supreme Court, the Court of Appeal and the High Court.⁵⁰⁶ The search fee is \$25.00.⁵⁰⁷
- 10.3 There is no fee prescribed by regulation for searching records of indictable offences in the District Court. Nor do the Summary Proceedings Regulations 1958 prescribe a fee for searching the records of summary proceedings in the District Court.
- 10.4 The fees set for a copy of records depend on the nature of the document and on the number of pages to be copied. The Criminal Proceedings (Search Fees) Regulations 1997 sets these fees for a copy of a judgment from \$15.00 for up to 5 pages, \$30.00 for up to 50 pages, \$40.00 for up to 75 pages and \$50.00 for over 75 pages.
- 10.5 The fee prescribed for copies of documents, not being judgments, is high, at \$5.00 per page. The issue of a certified copy of any document on file is a flat fee of \$35.00. The fees set for copying judgments by the Summary Proceedings Regulations 1958, are the same as for indictable proceedings. A certified copy of an entry in the criminal records is \$30.00.⁵⁰⁸

505 Note: all the fees prescribed include GST.

506 Criminal Proceedings (Search Fees) Regulations 1997, r 2, although the rules do apply to the District Court.

507 Criminal Proceedings (Search Fees) Regulations 1997, schedule.

508 Summary Proceedings Regulations 1958, r 4(1).

- 10.6 Under the Criminal Proceedings (Search Fees) Regulations 1997, the fees are not payable by any party to the proceedings or a solicitor acting for the party.⁵⁰⁹ Other people can apply to the court for an exemption. If the relevant court or judge considers that the person is unable to pay a fee, or ought not to be required to do so, the payment of the whole or part of that fee can be waived.⁵¹⁰

Practice – criminal proceedings

- 10.7 In the Supreme Court, the demand for accessing and copying of its records is low, probably, at least partly, because all Supreme Court outcomes are posted on its website. As a result, fees for searching and copying of criminal proceedings records are often not collected. The Court of Appeal collects \$25.00 for a search of the records as prescribed. The Court of Appeal usually charges \$25.00 for a copy of a judgment, but it may charge as little as \$15.00. The fees collected for a copy of a document which is not a judgment, are far less than those prescribed: for the first page it is \$1.00, between two and 50 pages is \$0.10 per page, and over 50 pages is \$1.00 per page. These are the same fees as those set by the Court of Appeal for civil proceedings.
- 10.8 In the High Court, the practice may well vary between offices, partly because of lack of demand and therefore of court staff awareness. However, copying can be charged at the same fee that is collected for civil proceedings.⁵¹¹

The regulations – civil proceedings

- 10.9 The Supreme Court Fees Regulations 2003 do not prescribe a fee for searching civil proceedings records. The fees prescribed for a copy of a civil proceeding judgment are the same as those prescribed for criminal proceedings judgments. Again, the fees do not apply to a copy supplied to a party to the proceedings.⁵¹² The Supreme Court Fees Regulations 2003 do not prescribe a set fee for copying a document, except a judgment, but stipulate that the fees are the “actual and reasonable costs”, a significant difference from the criminal regulations.⁵¹³ The registrar may waive the fees if satisfied that the applicant is unable to pay the fee, or there is a matter of genuine public interest in the proceeding.⁵¹⁴
- 10.10 There are no fees set by regulation, or by statute for searching and copying records of civil proceedings in the Court of Appeal, although rule 66 of the High Court Rules grants access to Court of Appeal civil proceedings records, on payment of the prescribed fee.⁵¹⁵ For the High Court, the fee is prescribed in the High Court Fees Regulations 2001 but these do not apply to the Court of Appeal. This is a gap in the regulatory framework and calls into question the legality of any fees collected by the Court of Appeal for searching and copying of its civil proceedings records.

509 Criminal Proceedings (Search Fees) Regulations 1997, r 3(2).

510 Criminal Proceedings (Search Fees) Regulations 1997, r 3(3). No exemptions are provided for in the Summary Proceedings Regulations 1958.

511 The High Court civil proceedings copying fees are the same as those for the Court of Appeal listed in para 703.

512 Supreme Court Fees Regulations 2003, schedule.

513 Supreme Court Fees Regulations 2003, schedule.

514 Supreme Court Fees Regulations 2003, r 5.

515 High Court Rules, r 66(14).

10.11 The High Court fees for copying records are very similar to the Supreme Court fees, and the fee for a copy of a non-judgment document is the “actual and reasonable costs”.⁵¹⁶ Unlike the Supreme Court, in the High Court there is a prescribed search fee, of \$25.00 in most cases.⁵¹⁷ Fees may be waived if the proceeding raises a matter of genuine public interest or the applicant is unable to pay the fees,⁵¹⁸ as in the Supreme Court. There is no automatic fee exemption for a party, or his or her solicitor, to the proceedings, again as in the Supreme Court.

10.12 In the District Courts Fees Regulations 2001, the same fees are set for a copy of a judgment, as in the Supreme Court and the High Court regulations.⁵¹⁹ For a copy of a document, other than a judgment, “actual and reasonable costs” are charged. The same exemptions may also be made in the District Court, as in the High Court.⁵²⁰ The search fee is set at \$20.00 for any court book or documents.

10.13 There are separate rules in relation to searching District Court records of proceedings under the Family Proceedings Act 1980 and the Care of Children Act 2004. These are found in the Family Proceedings Rules 1981.⁵²¹ The fees set by the District Courts Fees Regulations 2001 do not apply to these proceedings.⁵²²

Practice – civil proceedings

10.14 No fee is collected by the Supreme Court for searching records of civil proceedings, consistent with the regulations, and no fee is collected to satisfy the “actual and reasonable” cost required in the regulations for copies of non-judgment documents. As noted, the Court of Appeal does not have any legislatively prescribed fees. However, the Court still charges for searches and copies of its civil proceedings records.⁵²³

10.15 The High Court charges consistently with the fees prescribed by law for searching its civil proceedings records and for copies of judgments.⁵²⁴ In relation to copies of non-judgment documents, the “actual and reasonable” legislative requirement is satisfied by collecting: \$1.00 for first page, \$0.10 per page for between two and 50 pages, \$1.00 for over 50 pages.

516 High Court Fees Regulations 2001, schedule.

517 High Court Fees Regulations 2001, schedule. Compare the search fee in the criminal search fee regulations. For searching a register relating to the application for a grant of administration under the Administration Act 1969, or any corresponding former Act for a proceeding for the recall of any such grant, the fee is \$40.00 for each file searched.

518 High Court Fees Regulations 2001, r 6.

519 District Courts Fees Regulations 2001, schedule.

520 District Courts Fees Regulations 2001 r 4A, High Court Fees Regulations 2001 r 5.

521 However, there are no fees for searching, inspecting or copying in the Family Proceedings (Court Fees) Regulations 2004, or in the Family Proceedings Rules 1981.

522 District Courts Fees Regulations 2001, r 3.

523 Search fee is \$25, copy judgments \$15.00–\$50.00, copy of non-judgment document: the first page is \$1.00, between two and 50 pages – \$0.10 per page, over 50 pages is \$1.00 per page.

524 Search fee: \$25.00, copies of judgments: judgment not exceeding five pages: \$15.00; exceeding five pages but not more than 50 pages: \$30.00; exceeding 50 pages but not more than 75 pages \$40.00; exceeding 75 pages: \$50.00.

Specialist courts

- 10.16 No fees are prescribed for searching or copying Employment Court records. Generally, there is limited access to Employment Court records and no fees are charged for accessing its records.⁵²⁵ There are no fees prescribed for searching, inspecting or copying Environment Court records.
- 10.17 In the Family Court, parties to proceedings, their lawyer or agent on record, or a person with a proper interest, may search the records without paying a fee.⁵²⁶ Other people may search a document or record, filed or lodged more than 60 years earlier, on the payment of a fee, if any. At present, no fee is prescribed for doing this.
- 10.18 In the Māori Land Court, copies of orders or other documents will be supplied on the payment of the prescribed fee, if any.⁵²⁷ No fees are currently prescribed in the Māori Land Court Rules 1994 or the Māori Land Court Fees Regulations 1993. The Māori Land Court Fees Regulations 1993 do not prescribe a fee for searching its records. Further, “[n]o fee is payable in respect of the inspection, by any member of the public, of any register kept by the Court in relation to a Māori incorporation or of any documents required to be filed with the Court by any Māori incorporation”.⁵²⁸
- 10.19 In practice, no fee is charged for inspecting or searching Māori Land Court records. However, although no copying fees are prescribed and copying of the first 20 pages is free, after 20 pages \$0.20 is charged per page.⁵²⁹

DISCUSSION

- 10.20 The summary of the regulations and practices above highlights inconsistencies and differences between the various sets of regulations, within those regulations, and between the regulations and actual practice. Most of the differences appear to depend on the court, the type of proceeding, the type of document and the person wishing to search the records. It is clear that fees have been set on an ad hoc basis, for specific courts, without looking to the court system as a whole. As a result, fees are inconsistent, with significant gaps in the regulations. An example is the lack of fees set by regulation for searching or copying records of Court of Appeal civil proceedings.
- 10.21 The regulations are a complex web. They are difficult to locate and follow. This leads to lack of clarity and certainty for the public and administrators. The rules permitting access and copying of court records are structurally separate from the fees regulations for doing so. It is hard to identify any principles and policy underlying the fees regulations as a whole. This lack of consistent policy means that a right of access is sometimes granted but undermined by a high fee for that access.
- 10.22 There are inconsistencies between courts. For example, it seems unclear why no search fee is prescribed for Supreme Court civil proceedings records,

⁵²⁵ Email from Employment Court registry, 5 December 2005.

⁵²⁶ Family Court Rules, r 427.

⁵²⁷ Māori Land Court Rules 1994, rr 167(3), 167(4).

⁵²⁸ Māori Land Court Fees Regulations 1993, r 5.

⁵²⁹ Discussion with Shane Gibbons, Māori Land Court registry, 1 December 2005.

yet \$20.00 is required in the District Court.⁵³⁰ Then there are inconsistencies between criminal proceedings records and civil proceedings records. For example, a fee is set for searching Supreme Court criminal proceedings records, but no fee is prescribed for searching civil proceedings records.

10.23 Once located, and if they exist, it is usually clear what a prescribed fee is. However, where the charge is “actual and reasonable costs” for copies of civil non-judgment documents, fee setting is inherently unclear and is left to administrators. Is the “actual” cost always the “reasonable” cost?⁵³¹ The fee prescribed for criminal non-judgment documents is \$5.00 per page, which is far higher than the fees currently collected for copies of civil non-judgment documents. It could therefore seem that the fees prescribed for non-judgment criminal documents are neither actual nor reasonable.

10.24 Is the \$40.00 fee prescribed for the search of a register relating to the application for a grant of administration under the Administration Act 1969 “actual and reasonable”, where a \$25.00 search fee is prescribed for other searches of civil proceedings records? It is even arguable that the high fees could be a tax and unconstitutional, in breach of the long-established constitutional principle that only Parliament may levy a tax.⁵³²

10.25 The fees for copies of judgments, which should be available at low cost because they are part of the law of the country, can be higher than for other documents. Requesters should be told that some judgments are available on-line and that all should be routinely posted on-line by the middle of 2007.⁵³³

RECOMMENDATIONS 10.26 We are of the view that, because of the principles of open justice and of freedom of information, court records should be presumptively accessible.⁵³⁴ However, because of the costs involved in providing access to records, and copies thereof, it is reasonable for an appropriate fee to be charged in most cases.⁵³⁵ The level of fee may vary between users (for example, bona fide researchers may not be charged). Full cost recovery (user pays) may not be appropriate where collecting the full cost may deter people who have a genuine and proper interest in access to court records, or where it restricts the wider benefits. It may also be inappropriate to charge the full cost for any vetting or redactions of court records.

10.27 It is important to keep transaction costs to a minimum. The provision of clear law and guidelines in relation to who is charged for what will also help to reduce transaction costs and staff time.

530 And \$25.00 in the High Court.

531 If, under the currently collected fees, the forty-ninth page one has copied only costs \$0.10 but the fiftieth costs \$1.00 this cannot be the actual cost. Why would the fiftieth page be ten times more expensive to copy than the forty-ninth page?

532 This stems from the Bill of Rights 1688, and is reflected in the Constitution Act 1986, s 22, confirming that it is not lawful for the Crown to levy a tax, except by or under an Act of Parliament. “The Crown”, in this sense, includes the courts.

533 T Puller-Strecker *The Dominion Post* (Wellington, 6 March 2006).

534 See chapter 2, Principles, discussion on privacy.

535 This would include reasonable fees for copies of hardcopy judgments.

10.28 We propose a charging regime based on that in the Official Information Act 1982. Charges under the Official Information Act 1982 are to be “reasonable” and regard may be had to the cost of labour and materials involved in making the information available. The Government has approved guidelines for charging,⁵³⁶ which include an initial charge for staff time, for searching, abstracting, collating, copying and supervising access, in excess of one hour, at \$38 per chargeable half hour, or part thereof. The guidelines note that the charge should not include the cost of extra time locating or retrieving information that is not where it ought to be. Nor should it include time involved in decisions about access. Photocopying of any document should be charged at 20 cents per page after the first 20 pages. Some remission of charges is recommended where, for example, payment might cause hardship to the applicant or the information is likely to make a significant contribution to the operations of government, or the public is the primary beneficiary of the release of information.

Our recommendations are as follows:

RECOMMENDATION

R31 Charges for accessing and copying court records must be reasonable. The fees must not be unconstitutionally high or undermine any access provisions. They should reflect the actual time taken by court or archives staff to identify and locate the record but should not pass on storage and filing inefficiencies to the user.

RECOMMENDATION

R32 Charging guidelines for access should be devised for courts. These should be clear, easy to apply and easily located, to ensure staff know what fees apply in what situations. They should be consistent with the government charging guidelines for Official Information Act 1982 requests.

RECOMMENDATION

R33 The guidelines need to state clearly the principles in the Court Information Act and establish the powers of the fee collectors. They should apply across all jurisdictions and cover all courts.

RECOMMENDATION

R34 Charges may be included for vetting and redacting personal information from the record. Because these interests are also of value to the community as a whole, at least part of the cost may be absorbed by the taxpayer.

⁵³⁶ The last revised guidelines were approved on 18 March 2002. See Ministry of Justice *Charging Guidelines for Official Information Act 1982 Requests* (Wellington, 18 March 2002).

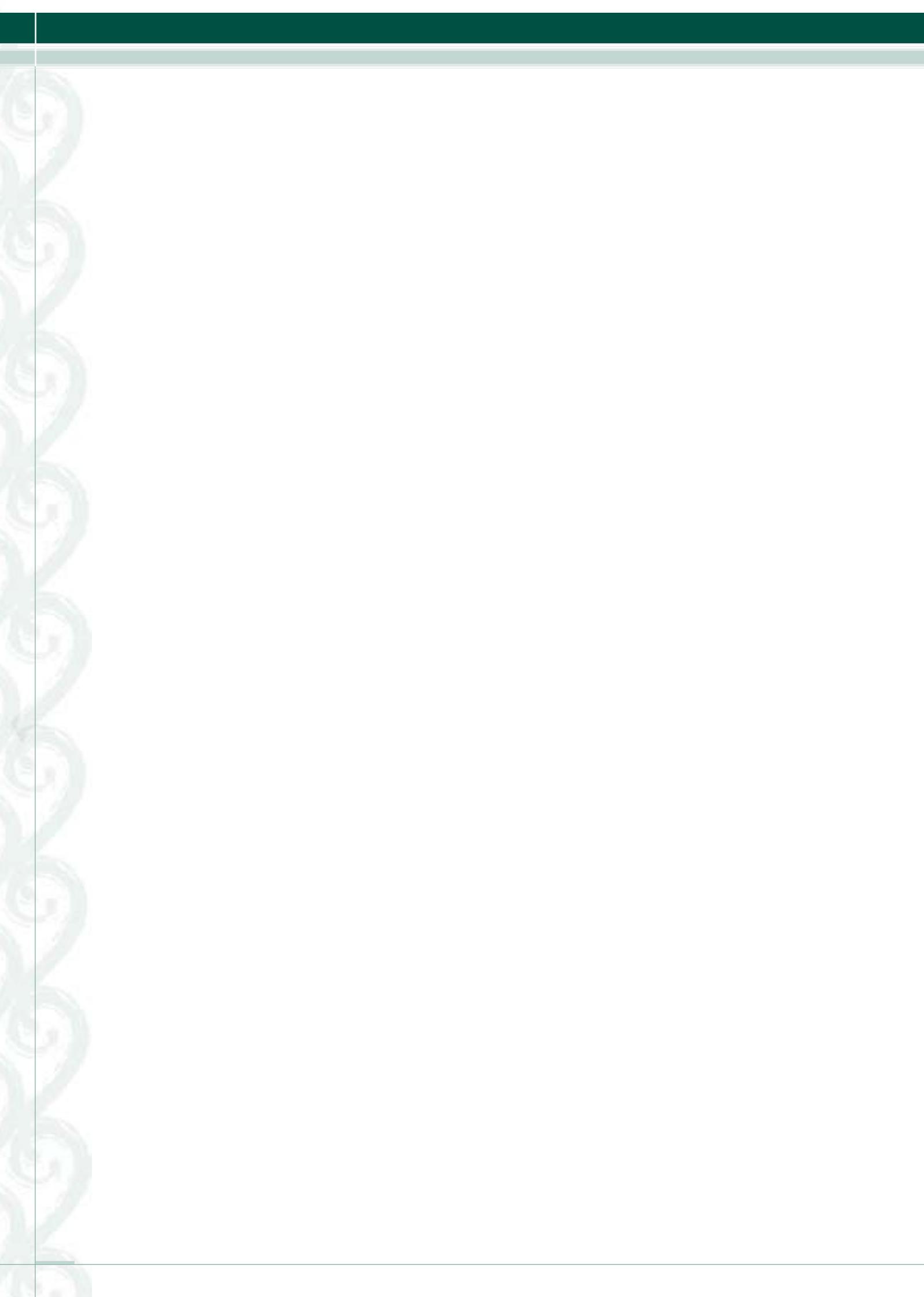
RECOMMENDATION

R35 Once costs have been assessed, waivers need to be considered. For example, parties to proceedings, and their counsel, ought to have an automatic waiver of fees for accessing a copy of their court records.

RECOMMENDATION

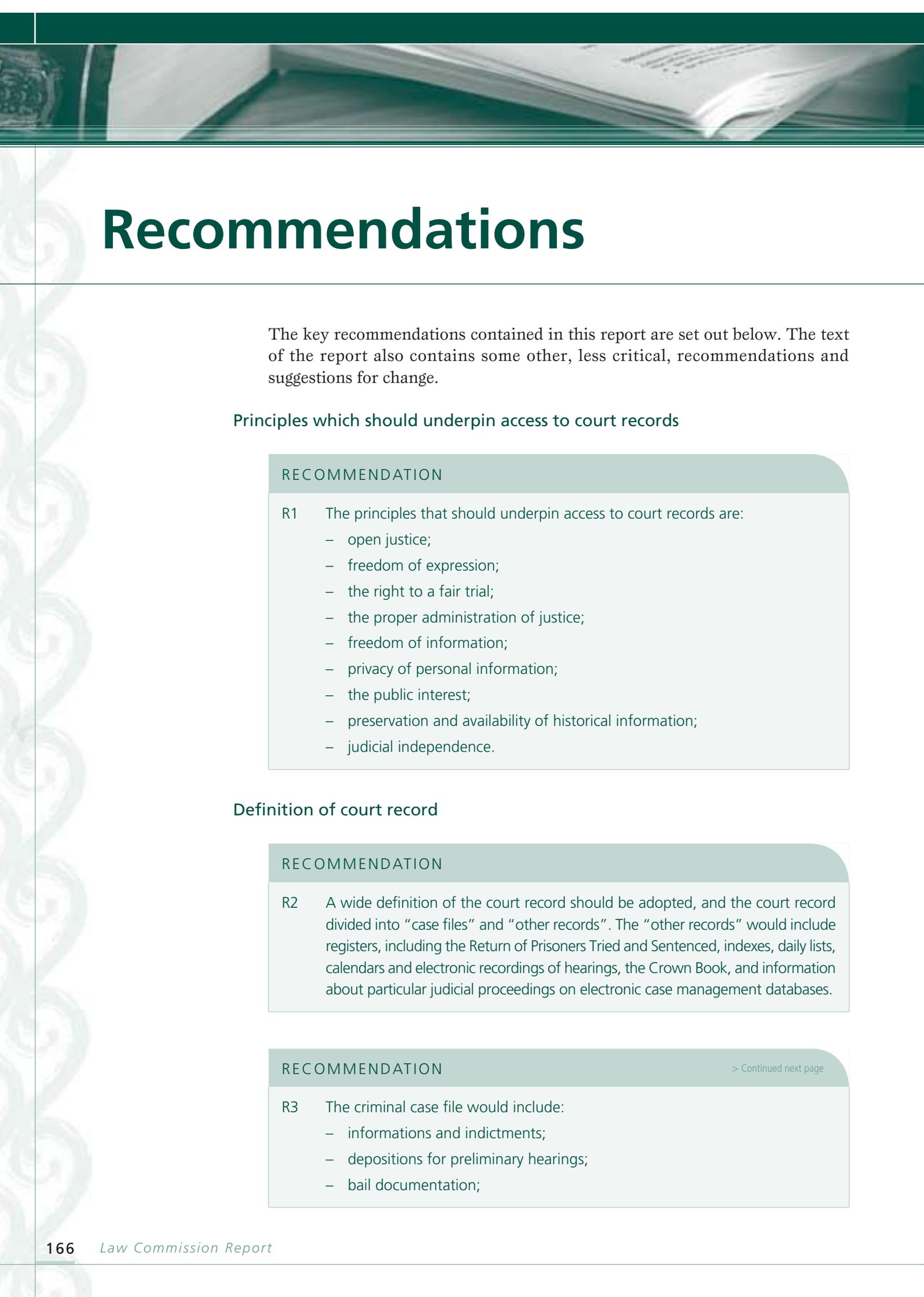
R36 Because of the public benefit from researchers having access to court records, researchers should be able to apply for a waiver, partial or complete, of the fees. For the same reasons, any person who can show that his or her accessing the court record is in the public interest should also be able to apply for a waiver, partial or complete.

10.29 It should be clear to applicants that if he or she considers the fee charged to be excessive he or she can make a complaint to the Office of the Ombudsmen.



RECOMMENDATIONS





Recommendations

The key recommendations contained in this report are set out below. The text of the report also contains some other, less critical, recommendations and suggestions for change.

Principles which should underpin access to court records

RECOMMENDATION

- R1 The principles that should underpin access to court records are:
- open justice;
 - freedom of expression;
 - the right to a fair trial;
 - the proper administration of justice;
 - freedom of information;
 - privacy of personal information;
 - the public interest;
 - preservation and availability of historical information;
 - judicial independence.

Definition of court record

RECOMMENDATION

- R2 A wide definition of the court record should be adopted, and the court record divided into “case files” and “other records”. The “other records” would include registers, including the Return of Prisoners Tried and Sentenced, indexes, daily lists, calendars and electronic recordings of hearings, the Crown Book, and information about particular judicial proceedings on electronic case management databases.

RECOMMENDATION

> Continued next page

- R3 The criminal case file would include:
- informations and indictments;
 - depositions for preliminary hearings;
 - bail documentation;

RECOMMENDATION

- jury lists for specific trials, subject to the Juries Act 1981;
- exhibits and exhibit lists;
- medical, psychological, psychiatric, pre-sentence or other reports;
- lists of previous convictions for a particular case;
- victim impact statements;
- pre-trial applications and affidavits;
- counsels' submissions, where provided;
- transcripts of hearings;
- all orders and judgments;
- correspondence for particular judicial proceedings.

RECOMMENDATION

- R4 The civil case file (including Family Court, Employment Court, Environment Court) would include:
- notices of proceedings;
 - pleadings;
 - exhibits and exhibit lists;
 - medical, psychological, psychiatric or other reports;
 - case conference material;
 - interlocutory applications and affidavits;
 - counsels' submissions, where provided;
 - transcripts of hearings;
 - all orders and judgments;
 - jury lists for specific trials, subject to the Juries Act 1981;
 - correspondence for particular judicial proceedings.

Official Information Act

RECOMMENDATION

- R5 The Official Information Act 1982 should be amended to make it clear that the Act does not apply to records of particular cases held on case management databases maintained by the Ministry of Justice.

Court Information Act

RECOMMENDATION

- R6 A Court Information Act should be enacted to establish a regime for dealing with access to court records. The presumption underlying the Act will be that court records will be accessible unless there is good reason to withhold them.

RECOMMENDATION

- R7 The Court Information Act should provide for the making of rules to govern access to court records. The rules should be set out in schedules to the Act, or in regulations made pursuant to the Act. The Act should establish an advisory committee for the purposes of consultation as to the content of the rules.

RECOMMENDATION

- R8 The Court Information Act should be implemented by detailed rules of court in all jurisdictions, with the exception of the Coroner's Court.

RECOMMENDATION

- R9 The new rules should apply to existing records.

RECOMMENDATION

- R10 A conclusive reason for withholding will exist if the making available of the information held on a court record would be likely to:
- (a) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences;
 - (b) prejudice the right to a fair trial; or
 - (c) endanger the safety of any person; or
 - (d) prejudice the proper administration of justice; or
 - (e) prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or
 - (f) prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government, or any international organisation.

RECOMMENDATION

- R11 Where one of the following reasons applies, good reason for withholding information on a court record may exist unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations that render it desirable, in the public interest, to make that information accessible. This exception will operate only if:
- (a) Withholding is necessary to protect information where the making available of the information:
 - would disclose a trade secret; or
 - would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information.
 - (b) Withholding the information is necessary to protect information that is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information:
 - would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or
 - would be likely otherwise to damage the public interest.
 - (c) The court record relates to a proceeding involving defamation, property disputes arising out of agreements to marry, proceedings at first instance in the Disputes Tribunals, or to a proceeding under any of the following statutes:
 - Adoption Act 1955;
 - Children, Young Persons, and Their Families Act 1989;
 - Family Proceedings Act 1980;
 - Property (Relationships) Act 1976;
 - Family Protection Act 1955 and Status of Children Act 1969;
 - Marriage Act 1955;
 - Civil Union Act 2004;
 - Care of Children Act 2004;
 - Harassment Act 1997;
 - Mental Health (Compulsory Assessment and Treatment) Act 1992;
 - Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003;
 - Protection of Personal and Property Rights Act 1988;
 - Alcoholism and Drug Addiction Act 1966.
 - (d) Withholding the information is necessary to protect the privacy of natural persons (including deceased natural persons).
 - (e) Allowing access to the court record would be contrary to court order.

RECOMMENDATION

- R12 The Court Information Act should also provide that information may be withheld if:
- (a) the making available of the information requested would be contrary to the provisions of a specified enactment; or
 - (b) the information requested is or will soon be publicly available; or
 - (c) the information requested cannot be made available without substantial collation or research; or
 - (d) the request is frivolous or vexatious, or the information requested is trivial.

Content of the rules

RECOMMENDATION

- R13 There are four periods in the life of a proceeding that are relevant for the purposes of access to court records:
- Period 1: pre-hearing (from the commencement of the proceedings until the commencement of the substantive hearing).
 - Period 2: during hearing (from the commencement of the substantive hearing until 28 days after the end of the proceedings).
 - Period 3: post-hearing (from 28 days after the end of the proceedings) to transfer to Archives New Zealand.
 - Period 4: after court records are transferred to Archives New Zealand.

RECOMMENDATION

- R14 Where leave is required under the rules to access any court record, it should be leave of a judge.

RECOMMENDATION

- R15 Subject to statute and court order, in the pre-trial period, parties and their counsel should be entitled to access all material on the court record without leave.

RECOMMENDATION

- R16 Subject to statute and court order, in the pre-trial period, non-parties should be entitled to access without leave:
- registers and indexes of proceedings;
 - any document where a right of search or inspection is given by any Act, or where the document constitutes notice of its contents to the public;
 - informations (after the first call) and indictments;
 - notices of proceeding and pleadings (after the first case conference);
 - interlocutory or pre-trial orders or decisions.

RECOMMENDATION

- R17 During the hearing, subject to statute or court order, parties in civil cases should be entitled to access all information on the case file without leave. Subject to statute or court order, non-parties should be entitled to access the following information without leave:
- indexes and registers;
 - any information if a right of search or inspection is given by any Act, or where a document constitutes notice of its contents to the public;
 - notices of proceeding;
 - pleadings;
 - written material that records what was said or done in open court;
 - information that could have been heard or seen by any person present in open court;
 - submissions of counsel (where provided);
 - transcripts of evidence;
 - orders, minutes, judgments and reasons for judgments, once given.

RECOMMENDATION

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- R18 During the hearing, subject to statute or court order, parties should be entitled to access all information on the case file. Subject to statute and court orders, non-parties should be able to access the following material without leave:
- indexes and registers;
 - informations;
 - indictments;
 - any information if a right of search or inspection is given by any Act, or where a document constitutes notice of its contents to the public;
 - written material that records what was said or done in open court;

RECOMMENDATION

- information that could have been heard or seen by any person present in open court;
- submissions of counsel (where provided);
- transcripts of evidence;
- orders, minutes, judgments and reasons for judgments, once given.

RECOMMENDATION

R19 After the proceeding, until the court record is transferred to Archives New Zealand, leave should be required for non-parties to access sensitive material, or court records of proceedings under the statutes specified in Recommendation 11(c). Subject to statute and court order, other court records should be available without leave.

RECOMMENDATION

R20 On transfer to Archives New Zealand, where access to court records is limited by statute, the court record should be classified as a restricted record. Where access to court records is limited by court order, or where the record relates to proceedings under a statute listed in Recommendation 11(c), the court record should be classified as a restricted record, with the restriction to lapse when the court record is 60 years old. Sensitive material (such as medical reports, pre-sentence reports, or information relating to victims and minors) on a court record should be classified as restricted, with the restriction to lapse when the court record is 60 years old.

RECOMMENDATION

R21 Classifications of records to be transferred to Archives New Zealand under the Public Records Act 2005 should be made by the Chief Justice or the Head of Bench of the court to which the records relate.

Appeals

RECOMMENDATION

R22 There should be one appeal as of right in relation to decisions on access to court records, and another with leave.

Court Calendars

RECOMMENDATION

- R23 Providing on-line access to court calendars should be a resource priority for development of the electronic medium for New Zealand courts and tribunals.

Records in electronic format

RECOMMENDATION

- R24 The issue of whether to allow remote public access to court records held in electronic format should continue to be assessed against overseas experiences. Careful consideration of appropriate policies to deal with the issues raised should receive the same priority as work on the technological advances in e-filing systems and capability.

Media

RECOMMENDATION

- R25 A reporter should not have to have been physically present in the courtroom in order to obtain copies of court records that were produced or relied upon in the open hearing.

RECOMMENDATION

- R26 Justices of the Peace 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 Justices of the Peace are concerned that release might prejudice a fair trial, the matter should be referred to a jury-warranted judge for decision.

Research

RECOMMENDATION

- R27 New Zealand needs a single entry point for all requests for access to court records by researchers. The process to be followed and the criteria upon which all research proposals will be considered needs to be fully articulated and published.

RECOMMENDATION

- R28 A committee of persons experienced in research and court records management should be established by the Ministry of Justice to consider all research proposals. This committee should have the final say on whether access is granted, and under what conditions. The process should be managed and supported by the Research, Evaluation and Modelling Unit.
- R29 This committee should develop guidelines similar to those informally followed at present, and to those published by the Department of Constitutional Affairs in England, for all researchers requiring access to court records.

RECOMMENDATION

- R30 A research proposal that requires access to court files should include:
- the details of the researchers' skills and qualifications and the organisation or body on behalf of which the research project was to be carried out;
 - aim of the study, the issue to be investigated, specific research questions and details of what is intended be done with the data obtained;
 - the significance of the study and the use to which the study will be put; the public or other benefits of the proposed research;
 - sample size, and a methodology setting out how it is proposed to carry out the project, including courts to be visited, how to minimise inconvenience to court staff, details of the category and number of court files it is intended to search, length of time of intended court visits, and data analysis method;
 - approval (generally at a later stage) by the organisation's ethics committee of details of method of ensuring confidentiality of people named in files, and any other ethical and cultural issues.

Fees

RECOMMENDATION

- R31 Charges for accessing and copying court records must be reasonable. The fees must not be unconstitutionally high or undermine any access provisions. They should reflect the actual time taken by court or archives staff to identify and locate the record but should not pass on storage and filing inefficiencies to the user.

RECOMMENDATION

- R32 Charging guidelines for access should be devised for courts. These should be clear, easy to apply and easily located, to ensure staff know what fees apply in what situations. They should be consistent with the government charging guidelines for Official Information Act 1982 requests.

RECOMMENDATION

R33 The guidelines need to state clearly the principles in the Court Information Act and establish the powers of the fee collectors. They should apply across all jurisdictions and cover all courts.

RECOMMENDATION

R34 Charges may be included for vetting and redacting personal information from the record. Because these interests are also of value to the community as a whole, at least part of the cost may be absorbed by the taxpayer.

RECOMMENDATION

R35 Once costs have been assessed, waivers need to be considered. For example, parties to proceedings, and their counsel, ought to have an automatic waiver of fees for accessing a copy of their court records.

RECOMMENDATION

R36 Because of the public benefit from researchers having access to court records, researchers should be able to apply for a waiver, partial or complete, of the fees. For the same reasons, any person who can show that his or her accessing the court record is in the public interest should also be able to apply for a waiver, partial or complete.



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