

Reference No. HRRT 021/2012

UNDER THE HUMAN RIGHTS ACT 1993

IN THE MATTER OF AN APPLICATION BY TVNZ FOR IN-COURT MEDIA COVERAGE

BETWEEN THE GAY AND LESBIAN CLERGY ANTI-DISCRIMINATION SOCIETY INC

PLAINTIFF

AND THE BISHOP OF AUCKLAND

DEFENDANT

AT AUCKLAND

TRIBUNAL: Rodger Haines QC, Chairperson

REPRESENTATION:

Mr D Ryken and Mr G Wong for Plaintiff

Mr B Gray QC and Professor PT Rishworth for Defendant

Ms H Wild for TVNZ

DATE OF DECISION: 30 April 2013

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**DECISION OF CHAIRPERSON  
GRANTING CAMERA IN-COURT APPLICATION SUBJECT TO CONDITIONS**

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[1] The hearing of these proceedings will commence on Monday 6 May 2013 at the Auckland District Court. The period 6 May 2013 to 17 May 2013 has been set aside.

[2] By application dated 17 April 2013 Ms Lucy Wilkinson, News Producer, One News, TVNZ has lodged a “camera in court application” in relation to the hearing.

[3] By *Minute* dated 18 April 2013 the plaintiff and defendant were asked to advise whether the application was opposed and if so, the reasons for the opposition. The Chairperson would then make a determination on the papers.

## **Position of the plaintiff**

[4] By notice of opposition dated 23 April 2013 the plaintiff opposes the application in part only. That is, the plaintiff does not oppose filming of the first ten minutes of the addresses by counsel for the plaintiff and counsel for the defendant. In all other respects, the plaintiff is opposed to the application on the grounds:

[4.1] The filming of the first ten minutes of the addresses by each party will adequately inform the nature and subject matter of the proceeding.

[4.2] The presence of cameras is likely to impact adversely on the hearing and in particular on the giving of evidence.

[4.3] The public can be fully informed of the nature of the proceedings, of the evidence given and of the rulings of the Tribunal through attendance at the hearing by the media (other than through "camera in court") and by the Tribunal's written decision on the merits of the proceedings.

[5] The grounds of objection are expanded upon by Mr Ryken in his written submissions dated 23 April 2013. In these submissions Mr Ryken stresses that the filming of witnesses as they give evidence is likely to have a chilling effect and may cause witnesses to be more circumspect than they might otherwise be. Emphasis is placed on the need for witnesses to be able to give their evidence candidly and without the inhibition of being filmed. Indeed, if the filming of evidence is to be allowed, the plaintiff may need to seek a direction relating to one particular witness.

[6] Mr Ryken makes reference to the interim non-publication order made by the Chairperson on 10 September 2012 pursuant to ss 95 and 107(3)(b) of the Human Rights Act 1993. That order prohibited publication of the name and occupation or of any other details which might lead to the identification of the complainant in these proceedings. In his submissions of 23 April 2013 Mr Ryken has indicated that the complainant will not at the hearing on 6 May 2013 seek a continuation of the non-publication order.

## **Position of the defendant**

[7] By letter dated 24 April 2013 Mr Gray QC has advised that the Bishop of Auckland has no submissions to make in respect of the application and will abide the decision of the Tribunal.

## **Discussion**

[8] Grant of the present application for camera in court coverage of the hearing is at the discretion of the Tribunal. The starting point must be s 107 of the Human Rights Act 1993 which provides:

### **107 Sittings to be held in public except in special circumstances**

- (1) Except as provided by subsections (2) and (3), every hearing of the Tribunal shall be held in public.
- (2) The Tribunal may deliberate in private as to its decision in any matter or as to any question arising in the course of any proceedings before it.
- (3) Where the Tribunal is satisfied that it is desirable to do so, the Tribunal may, of its own motion or on the application of any party to the proceedings,—
  - (a) order that any hearing held by it be heard in private, either as to the whole or any portion thereof:

- (b) make an order prohibiting the publication of any report or account of the evidence or other proceedings in any proceedings before it (whether heard in public or in private) either as to the whole or any portion thereof:
  - (c) make an order prohibiting the publication of the whole or part of any books or documents produced at any hearing of the Tribunal.
- (4) Every person commits an offence and is liable on summary conviction to a fine not exceeding \$3,000 who acts in contravention of any order made by the Tribunal under subsection (3)(b) or subsection (3)(c).

**[9]** The premise of this provision is that every hearing of the Tribunal must be held in public. However, the Tribunal has power under subs (3), if “satisfied that it is desirable to do so”, to order a hearing in private, to make non-publication orders and to restrict publication of exhibits in the form of books or documents. It is clear that the requirement in subs (1) that hearings of the Tribunal be held in public is not an absolute one.

**[10]** When determining whether it is “desirable” to exercise one or more of the powers in s 107(3), the Tribunal must have regard to the presumption of open judicial proceedings, freedom of speech (as allowed by s 14 of the New Zealand Bill of Rights Act 1990) and the right of the media to report. The Tribunal must identify and weigh the interests of both the public and of the individual including the need for a fair hearing.

**[11]** It has been accepted that the requirement of a public hearing is not pressed to the point where publicity causes unfairness: Scott Optican and Paul Rishworth “Minimum Standards of Criminal Procedure for Trial, Sentencing, and Appeals” in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 663 at 670 cited with approval by Mallon J in *Television New Zealand Ltd v Green* [2009] NZAR 69 at [23]:

[22] In light of these submissions I start with setting out the principles relating to open justice. The rights affirmed and protected under the Bill of Rights Act include the right to “a fair and public hearing” (s 25(a)). The right to a public hearing applies to all criminal proceedings (*Television New Zealand Ltd v R* [1996] 3 NZLR 393 (CA) at p 397). There are many statements in the cases about the importance of this right. For present purposes it is enough to say that the right to a public hearing provides transparency crucial to the fulfilment of the right to a fair hearing, helps to preserve public confidence in the legal system, and assists in fostering the sound and principled exercise of judicial power (see, for example, *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277 at paras [118] – [121]).

[23] Although a defendant has the right to a public hearing, many would prefer to avoid the embarrassment or shame which those who come before our courts on charges may feel. However, the importance of an open criminal justice system is such that they, and others involved in the process, cannot avoid a public hearing except in limited circumstances. The exceptions (provided for in the Criminal Justice Act 1985) arise because “the requirement of a public hearing is not pressed to the point of publicity that causes unfairness” (Rishworth et al, *The New Zealand Bill of Rights* (2003), p 670). But outside these limited exceptions, the principle is one of openness.

**[12]** In this decision Mallon J at [27] and [28] sets out the general principles governing access of the media to court proceedings:

[27] The public nature of the courtroom means that the public are entitled to be present and to see who appears in our courts. The media act as “the eyes and ears” (as it has been said) of those who cannot be present, but who have an interest in what has occurred. In this day and age that can include visual coverage of what has occurred and, as the Court of Appeal said in *R v Thompson* [2005] 3 NZLR 577 at para [39], “[t]elevision in the courtroom is now a regular feature of the judicial landscape”. While television “does amplify the public gaze to an altogether greater order” (as was said in *R v Crutchley* (High Court, Hamilton, CRI 2007-68-83, 16 May 2008) at para [8] – see para [36] below), a visual image can be “a very powerful mechanism for conveying information about events” (*Mafart v Television New Zealand Ltd* [2006] 3 NZLR 534 at para [69]; see also *Television New Zealand Ltd v Rogers* [2007] 1 NZLR 157 (CA) at para [128]) and so potentially can well serve the values that underpin the open justice principle.

[28] Open justice and freedom of expression are not, however, the only considerations. Just as information may be suppressed, fairness requires that there are limits, appropriate to the particular proceedings, as to what is photographed or filmed. Media wanting to record a visual image by photograph or film must seek permission from the judge, who has the responsibility of ensuring that the photographs or filming do not interfere with the rights of an accused to a fair trial or that it does not in some other way conflict with the demands of justice in a particular case.

[13] Although these observations were made in the context of criminal proceedings, it has been accepted that they apply also in the context of civil proceedings. See *Polymer Group Ltd v South Vineyard Ltd* HC Wellington CIV-2009-485-1298, 8 November 2010 at [4]. As pointed out by Associate Judge Gendall in that case, guidance can also be found in the (now) *In-Court Media Coverage Guidelines 2012*. The guidelines do not have legislative force, but they provide a useful starting point for applications of this nature, emphasising the need to balance the desirability of open justice against all other relevant matters, including the demands of justice in a particular case. *Guideline 2* sets out the purpose of the *Guidelines*:

## 2. Purpose

1. These guidelines are intended 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.
2. In making decisions and exercising discretions under these guidelines, the court may have regard to the following matters:
  - (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.

[14] *Guideline 12 – Additional discretionary witness protection* (which applies to all witnesses in civil trials) also provides that on an application by a witness that he or she not be filmed, photographed or recorded, the decision-maker may have regard to the following criteria:

6. In considering the application, the judge may have regard to:
  - (a) the principles set out in guideline 2
  - (b) whether covering the trial is likely to affect adversely the quality of the evidence to be given by the witness
  - (c) whether the presence of a video camera, a photographer or a sound recorder is likely to lead to the witness not turning up to give evidence
  - (d) whether being filmed, photographed or recorded may cause undue stress or anxiety to the witness
  - (e) whether being filmed, photographed or recorded may lead to intimidation or harassment of the witness
  - (f) whether the witness's privacy interests outweigh the public interest in publishing or broadcasting that witness's evidence, given the likely significance of the evidence
  - (g) any other relevant matters.

[15] Applying these Principles by analogy to the present application, responsible counsel advises that the filming of witnesses during their evidence will create the risk that one or more would feel inhibited from providing evidence with full candour. Indeed protection for one witness might be sought. As Mr Ryken pointed out, the submission is not to be taken to indicate that any of the plaintiff's witnesses do not intend to give evidence in full candour. Rather it is the "chilling effect" which may ultimately be to the prejudice of the particular witness and beyond that to the party. In the words of *Guideline 12*, there is a risk that the filming of witnesses could adversely affect the quality of the evidence to be

given and may cause undue stress or anxiety. As *Guideline 2* of the *In-Court Media Coverage Guidelines 2012* recognises, proper regard must be had to “the interests and reasonable concerns and perceptions” of witnesses.

**[16]** In these circumstances I am persuaded that the application to film witnesses while in court or giving evidence is to be declined.

**[17]** That having been said, however, the application is in all other respects to be granted. Mr Ryken has submitted that, following the practice of the Employment Court, the filming of only the first ten minutes of counsels’ addresses should be permitted. This, however, may be unduly restrictive given that it cannot necessarily be assumed that the first ten minutes of the opening addresses by counsel will provide sufficient for the public to be reasonably informed visually of the proceeding. In these circumstances it is not intended that a time limit be placed on the filming of the addresses and submissions made by counsel.

**[18]** Granting the application for a “camera in court” which permits the filming of the submissions of counsel for the parties but which prohibits the filming of witnesses while giving their evidence does not in any way compromise the principle of open judicial proceedings and freedom of speech. My concern is that a fair hearing could be compromised. This is a significant factor given the terms of s 105(2)(b) of the Human Rights Act. The Tribunal is required to act in a manner that is fair and reasonable. Given the concerns that have been expressed as to the likely adverse effect on the quality of the evidence to be given by witnesses, the additional stress and anxiety they will face I conclude that the interests of the witnesses outweigh the public interest in filming or broadcasting their evidence.

## **Orders**

**[19]** In the result the following orders are made:

**[19.1]** The application to film witnesses while in court or giving evidence is declined.

**[19.2]** The application is otherwise granted subject to any application the parties may make for an order suppressing the name and identifying details of any witness.

**[19.3]** The *In-Court Media Coverage Guidelines 2012*, appropriately adapted, are to apply including Schedule 2 which prescribes the standard conditions for film.

**[19.4]** Leave is reserved to both parties and to TVNZ to make further application should the need arise.

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**Mr RPG Haines QC**  
**Chairperson**