

Lifting the veil – the changing face of judgments publishing in the Family Court of Australia

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Abstract

The Family Court of Australia has recently made significant and substantial changes in its approach to judgments publication. Demonstrating its commitment to accountability and transparency, and support for the concept of open justice, virtually all FCoA judgments are publicly available from 2007- on AustLII. This contrasts with previous practice whereby only selected judgments of jurisprudential value were published. This paper will discuss some of the practical aspects of devising and implementing changes to longstanding practice. Issues such as the legislative requirement to anonymise all judgments prior to publication, and change management strategies to facilitate acceptance of the new publication practices, will be described. The paper will identify some of the ongoing challenges faced by the Court in making its judgments publicly available. In conclusion, some personal observations will be made about the challenges and rewards of stepping outside the traditional role of the law librarian.

Introduction

The Family Court has recently made important and substantial changes in its approach to publishing judgments. The Court has made virtually all of its judgments from 2007 onwards available on the AustLII website. This contrasts with previous practice whereby only selected judgments of jurisprudential value or significant public interest were published. The evolution of the changes and the challenges faced and overcome will be discussed in this paper. In addition, some personal reflections will be provided on the experience of stepping outside the traditional role of law librarian.

About the Family Court of Australia

The Family Court of Australia is a superior court of record in the Federal jurisdiction which was created under the *Family Law Act 1975* (Cth). Its purpose is the resolution or determination of family disputes. Matters which come before the Court may include issues relating to children and/or property.

As a national court, it has registries in all States of Australia except Western Australia which retains jurisdiction in family law.

Reporting of family law judgments in Australia

For the purposes of this discussion it should be noted that there is a difference in the meaning of the terms 'publishing' and 'reporting'. Publishing simply refers to the process of making judgments publicly available, regardless of the medium of dissemination. Reporting refers to the publication of judgments in the law reports which contributes to the doctrine of stare decisis in the common law system.

There is no authorised report series for Family Court judgments. There are, however, two series of law reports which report on family law decisions in Australia, being *Family Law Cases* (CCH) and *Family Law Reports* (Lexis Nexis). Judgments are published for a limited period on the Court's website and permanently on the AustLII site in one of two databases - *Family Court of Australia 1982-* or *Family Court of Australia - Full Court 2008-*. Media coverage of cases of interest to the public is a further avenue of public access to the Court's decisions.

Publication of judgments serves two important functions. It demonstrates a court's commitment to accountability and transparency and provides a foundation for the concept of open justice. It also provides essential educational information, not only for the legal profession but also for the wider community comprising politicians, policy makers, students, researchers, self represented litigants and the general public.

Different jurisdictions, different requirements

In order to make its judgments publicly available, the Family Court faces a unique problem. Publication of family law judgments in Australia is restricted by the requirements of s 121 of the *Family Law Act*. Where other courts are able to publish their judgments "as delivered" to the parties, the Family Court

must ensure that any identifying information is removed prior to publication. This process is labour intensive and imposes a substantial extra burden on the Court's resources. It also makes it impossible to publish judgments to the internet directly from chambers, as happens in some other jurisdictions.

S 121 – anonymisation of identifying information

Briefly, the requirements of s 121 are that publication of information about proceedings in the Family Court must not identify a party or witness, and any breach may incur a criminal sanction of up to 1 year's imprisonment.

Information which may lead to identification includes:

- Name
- Address
- Date of birth, marriage or death
- Occupation
- School or educational body
- Employer
- Recreational pursuits/memberships
- Real or personal property

It may also include contextual information such as residential or business history of the parties. Certain exemptions to the requirements of s 121 are provided for the legal profession, researchers and law report publishers.

Family Court judgments – “old policy”

Historically, the practice of the Family Court had been to publish most of its Full Court decisions and only those first instance judgments that were considered by an internal committee to be of sufficient public interest or jurisprudential import. This limited publication to around 150 judgments a year, of which only a few would be from single judges. Anonymisation was undertaken by judges' associates and the actual publication process was undertaken by the Court's library team.

Impetus for change

On her appointment in 2004 Chief Justice Bryant determined there was a need to review the Family Court's policy regarding judgments publication. The profession and academics had drawn attention to the paucity of information about the day to day workings of the Court and everyday decisions. Of particular relevance to the family law jurisdiction were the sustained criticism and misconceptions arising in part from the lack of information about an area of law beset with high emotion and subjectivity. Accusations of judicial bias, operational secrecy, decisions based on ideology rather than evidence, etc have regularly been aired in the press. The Chief Justice believed that it was essential to publish more "routine" judgments to dispel the myths about family law decision making and to increase public accessibility to knowledge about the "workings" of the Court. It was also hoped that wider publication would lead to more informed reporting of family law matters in the media.

The outcome of the review of the judgments publication policy was the decision to publish all Family Court judgments, the only exception being where the relevant judicial officer had issued a non-publication order.

Family Court Judgments Project

The first step in the implementation of the changed policy was what came to be known as the "Judgments Project" - the development of a standard judgments template to be used by all chambers. I was offered the opportunity at the beginning of 2005 to go "off-line" from my library officer role to undertake the project, which was initially proposed to take six months. It was acknowledged from the start that a successful outcome would be dependent on sensitive handling of change management issues. Prior to this time each judicial chamber had its own judgments template, tailored to the individual judicial officer's preferences. This was not a problem where judgments were solely available to the parties and their representatives but became so where publication of routine judgments was proposed.

The project scope was the development of a standard judgments template in Microsoft Word, preferably with the facility to automate the process of adding the judgment to the Court's internal Lotus Notes judgments database. A cross-jurisdictional comparison of judgment templates/standards was undertaken and requirements for Family Court judgments were established through close consultation with the Senior Administrative Judge of the Appeals Division of the Family Court. External expertise was sourced to undertake the Visual Basic coding that was needed to enable a process whereby, at the click of a button within the completed document, a record could be automatically created in the judgments database and a copy of the judgment attached. This process had previously been done manually by the associates.

Expansion of Judgments Project

Over its course, and with consequent multiple extensions, the Judgments Project "grew like Topsy" as issues relating to expanded publication were identified and resolved. Some of the issues were practical in nature, for example the incorporation into the template of family law catchwords and the development of a style guide for use in the preparation of judgments. Others were matters of policy, such as the decision to use pseudonyms in place of party names for publication purposes and the protocols to be observed in the publication process. Anonymisation guidelines were developed to ensure the Court met its obligations under s 121.

The Appeal Division trialed and approved the new judgments template and publication documentation in the latter half of 2006, and the decision was taken by the Chief Justice to publish all first instance judgments from the beginning of 2007.

Some practical implications of new policy

The expanded publication of Family Court judgments had a number of practical implications. Progressing from publishing around 150 judgments per year to upwards of 1300 obviously required allocation of additional resources to undertake the anonymisation and publication processes. It was decided during the Judgments Project that anonymisation of first instance judgments would not be undertaken by judges' associates, as had previously been the case. A new position of judgments publication officer was piloted to establish targets and skills levels required for anonymisation.

An appropriate protocol was required to handle the identification and resolution of policy and practical issues. This was (and is) part of my brief and essentially involves issues/suggestions being brought to my attention by stakeholders. A problem solving/decision-making hierarchy is then employed – if resolution is beyond my authority, the issue is raised with the Chief Justice's senior legal researcher; if she lacks authority for resolution, it is raised with the Senior Administrative Judge of the Appeals Division who decides whether it ultimately requires input from the Chief Justice.

Relationship building was, and is, an important factor in the initial project and the ongoing operation. Stakeholders range from the Chief Justice, Judges and Court staff, to AustLII and the commercial publishers. Also included are the profession and law librarians. A substantial amount of time was allocated to the development and maintenance of these mutually important relationships.

Creation of the Judgments Publication Office

In February 2007, in conjunction with the implementation of the new judgments publication policy, the Judgments Publication Office was created and I was appointed to the position of judgments publication coordinator. The JPO is part of the Court's Information Management team and functions independently of the library. Its purpose is to undertake the storage, retrieval, anonymisation and publication of judgments. It employs two judgments

publication officers who do all tasks associated with the anonymisation and publication of first instance judgments. My role has responsibility for management of the team and for the publication of Appeal judgments.

Change management strategies

Positive change management strategies were vital to achieving a successful adoption of the new publication policy. Cooperation of two stakeholder groups in particular – Judges and their associates – was crucial. It is not possible to over estimate the importance and influence of having a high level champion for such significant organisational change. The Chief Justice's commitment to providing greater public access to the Court's judgments was an essential element in promoting an awareness of the need to change past practice.

The need to build in a strong benefit for Judges' associates to encourage them to embrace the concept of Court-wide standards, rather than maintain chambers individuality, was an intrinsic factor in developing and promoting the template. The decision to automate creation of records and uploading of judgments in the internal database from within the Word document was perceived as a way to lessen their workload and thus ensure acceptance. Extensive liaison and consultation with associates was also employed as a means to encourage a sense of "ownership".

These strategies were supported by the provision of information/training sessions in support of the new policy to associates at each registry, either in group sessions or individually. This interaction with associates also provided the opportunity for me to personally promote the importance of a national approach to judgments preparation and publication.

Benefits beyond the family law jurisdiction

Two years on, the Family Court is publishing its judgments as a matter of routine. The impact of the wider publication has extended beyond the original stakeholders to encompass the non-family law legal community in Australia

and overseas. Support and information, particularly with regards to anonymisation, has been provided to the Religious and Supreme Courts of Indonesia, a Tanzanian judicial delegation, the NSW Attorney-General's Department, and the Canadian Department of Justice.

The Court is partnering with AustLII to improve access to judgments, particularly through the Online Citation project. Knowledge sharing with other jurisdictions is ongoing on issues such as the potential for identity theft arising from personal information incorporated in judgments.

Ongoing challenges for judgments publication

Challenges for the Family Court in publishing its judgments are likely to continue into the future. The need to balance the principle of open justice with the requirements of s 121 is constantly being tested by the difficulty in anonymising judgments where parties have a high media profile or matters are particularly complex.

The allocation of pseudonyms occasionally raises the ire of parties – in one memorable case, a party made an application for the judge to make an order changing the previously used pseudonym for her matter on the basis that it was culturally inappropriate.

Achievement of genuine consistency is undermined when chambers “refine” the template in an attempt to produce “personalised” judgments. Data integrity and document security are longstanding problems, with multiple versions and tracked changes in documents creating existing and potential problems.

Catchwording of judgments from chambers where this was not previous practice is another problematic area. While the sheer volume of published judgments may appear daunting, judicious use of catchwords facilitates ready location of judgments on a particular topic.

Despite these challenges, the development and implementation of a new judgments publication policy has achieved its aim of opening a window onto the workings of the Family Court. Within the Court, all chambers have adopted the judgments template, albeit with varying degrees of consistency.

Finally, some personal reflections

For me, the journey has been exciting, interesting, exhausting and almost always nerve-wracking. From out of left field, it has provided me with a unique opportunity for professional development away from the familiar environment of the library. Ironically, I completed my LIS degree the year after I moved out of the Family Court library and into judgments publication.

While a non-traditional career path may not be for everyone, I have found the rewards to be considerable. Being involved in building an initiative from the ground up, being entrusted with the carriage of major organisational change, and being in the position to make a positive contribution to the Court and broader community has been a wonderful and enriching experience.

The most notable negative factor that I have found has been the potential for professional isolation. Fortunately, this has been largely overcome by maintaining strong working relationships with my supervisor and other members of the Information Management team. Taking advantage of conferences and workshops such as this one also facilitates professional networking with a variety of stakeholders and colleagues and goes a long way to ameliorating any sense of isolation.

