Publishing Family Court judgments: problems and solutions

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Abstract:

Why does the Family Court publish its judgments in anonymised form? What are the practical options for anonymisation? How are pseudonyms allocated? How does the Court ensure that judgments are sufficiently anonymised to avoid identification of parties and their children without impacting on the integrity of the Judge's reasons? How does the Court balance the competing needs for public access and parties' privacy? This presentation provides an overview of judgment anonymisation and publication by the Family Court, and examines some of the associated problems.

Introduction

The Family Court of Australia is a superior court of record, tasked to assist Australians to resolve their most complex legal family disputes. As a matter of interest, it is not a 'closed' Court and anyone is able to observe its hearings; only rarely are hearings held in camera. Judgments should ideally be made widely available to promote access to justice for precedent and public information purposes. This is particularly important, given that up to 22 per cent of litigants in the Court are self-represented at some stage during the course of their matter.

Historically, until 2007, limited numbers of judgments were published online based solely on their precedential value. This had the effect of severely limiting the amount of publicly available family law case law and promoted the perception of the Court as a secretive organisation, exempt from public

scrutiny. It also meant that first instance judgments, which provide a window into the conduct of proceedings and contribute to transparency, were inaccessible to the wider community.

In preparing family law decisions for publication extra resourcing, over and above that required in other jurisdictions to undertake the same task, must be provided to anonymise them. Anonymisation is the deceptively simple task of removal and/or replacement of any identifying information in the judgment – whether that information be factual or contextual.

Family Law Act 1975 (Cth) s 121 – Restriction on publication of court proceedings

Under the Act, publication by any means of information that would identify parties and witnesses is a criminal offence. Section 121(1) reads:

> A person who publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:
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> (a) a party to the proceedings;
>
> (b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or
>
> (c) a witness in the proceedings;
>
> is guilty of an offence punishable, upon conviction by imprisonment for a period not exceeding one year.

Fortunately, s 121(3)(a) provides an effective starting point for anonymisation. It lists the sort of 'particulars' that should be taken to be identifying:

> (3) Without limiting the generality of subsection (1), an account of proceedings, or of any part of proceedings, referred to in that subsection shall be taken to identify a person if:
>
> (a) it contains any particulars of:
>
> (i) the name, title, pseudonym or alias of the person;

(ii) the address of any premises at which the person resides or works, or the locality in which any such premises are situated;

(iii) the physical description or the style of dress of the person;

(iv) any employment or occupation engaged in, profession practised or calling pursued, by the person or any official or honorary position held by the person;

(v) the relationship of the person to identified relatives of the person or the association of the person with identified friends or identified business, official or professional acquaintances of the person;

(vi) the recreational interests, or the political, philosophical or religious beliefs or interests, of the person; or

(vii) any real or personal property in which the person has an interest or with which the person is otherwise associated;

being particulars that are sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case requires;

…

This list is obviously not exhaustive and comprises largely factual information. Online publication of judgments increases the complexity of anonymisation because the use of search engines such as Google (depending on the expertise of the user) makes 'joining the dots' to identify parties/children much easier than in the 'old days' of print and paper.

Family Court publication policy post-2007

In 2007, the Chief Justice introduced a new judgments publication policy whereby almost all of the Family Court's judgments would be published on AustLII, including both substantive and interim judgments at first instance and on appeal. To give an idea of the scope of that change of policy, prior to 2007 approximately 200-250 judgments were published annually; since 2007, that figure has increased to around 1500 fully anonymised judgments published per annum.

The Judgments Publication Office ("JPO") was created to develop, manage and undertake the publication process. Under the guidance of senior judicial

officers, a standard judgments template, judgments production style guide, anonymisation guidelines and a family law specific catchwords list were developed and implemented.

The JPO, with a permanent staff of two supplemented with occasional contract assistance, depending on workload requirements, carries out the anonymisation and publication of judgments. Exception to the publication policy may be made where a suppression or non-publication order is made by the Judge – in which case, the JPO must be notified to avoid "accidental" publication. Such orders are relatively rarely made.

Anonymisation principles

When anonymising judgments, three principles need to be borne in mind – privacy of the parties and children; integrity of the Judge's reasons; and ensuring the finished product is intelligible. These principles may at times conflict with each other, requiring a delicate balancing act to achieve effective anonymisation of the judgment at hand.

Anonymisation – which option?

The general practice of the Family Court has been to use generic language in judgment writing. In family law judgments, using terms such as "the mother", "the father", "the child", "the paternal grandparents" etc, or legal classifications (eg "applicant", "respondent"), can actually be more easily read and understood than the use of names ad infinitum, particularly if the matter involves a large extended family with intergenerational name-sharing. Writing in generic language has the additional benefit of minimising the amount of anonymisation required to make the judgment publishable.

For Courts undertaking routine anonymisation of judgments, there are two options from which to choose.

Partially automated anonymisation uses software designed to find and replace pre-defined words from text. This process is supplemented by a subsequent

quality control check to identify and undertake any further anonymisation required. This is the option chosen by the Federal Circuit Court of Australia

Manual anonymisation is a traditional 'word by word, line by line' editing process where individual words and phrases are substituted by less identifiable terms/phrases, eg an 'electrician' might become 'skilled tradesman'. As an incidental consequence of the anonymisation process, the judgments officer undertakes an informal proof reading role whereby minor punctuation, grammatical and/or formatting errors may be corrected, and more serious problems referred back to chambers for resolution, prior to external publication of the judgment. This is the option selected by the Family Court of Australia.

Why use pseudonyms?

Prior to 2007, sensitive Family Court judgments were usually anonymised by the use of the first letter of the parties' surnames or their initials place of names. With the increased publication, that practice fell out of favour – within 1500 judgments per annum there could potentially be a hundred or more "*B & B* [2015] FamCA …", most of which would be unrelated matters.

The decision to replace party names with pseudonyms was taken for several reasons:

- It is easier for litigants and lawyers to remember actual names rather than letters/initials for citations.
- It is an effective way to protect the parties' privacy.
- It enables the media to report on family law cases without risk of breaching s 121.
- Pseudonyms are allocated to the matter, rather than the individual decision, which enables the reader to track back across multiple decisions in the same matter.

Factors to consider when allocating a pseudonym

Publication of its judgments provides a window into the client base and operation of a court. To facilitate that transparency for the Family Court it is desirable the pseudonym that is allocated to a matter is as akin to reality as is possible within the constraints of s 121.

This is achieved by using pseudonyms that:

- Begin with same letter as the party's actual name.
- Be ethnically appropriate.
- Be culturally sensitive.
- Be respectful to the parties.
- Be phonetically dissimilar to the party's actual name.

Anonymisation – how to anonymise a Family Court judgment

The document's Advanced Properties fields are checked and any personal metadata about judges and staff is removed. The Microsoft Word user profile for JPO staff is set up so that all documents are saved as "Family Court of Australia".

The first step in anonymisation of a judgment is the identification of an existing pseudonym or the allocation of the pseudonym if a new matter.

Only parties identified on the cover sheet of the judgment as applicant(s) and respondent(s) are given a pseudonym, all other names used in the judgment are anonymised by letters or generic terminology.

As each letter used stands in place of a word, it is important that the same letter should not be used for different words. Of necessity, particularly when anonymising complex judgments, there may be times where this can only be achieved by using combinations of letters.

Government agencies and large business entities do not usually require anonymisation, unless it is apparent that failure to do so would lead to the identification of a party or witness. For example, the fact that the parties hold accounts with the Commonwealth Bank would not be identifying unless account numbers were included.

Private business entities and smaller companies with which the parties have some involvement are anonymised where possible using generic language. However, in complex property matters, for example, it will often be necessary to replace company names with letters. In that case it is important to ensure that only the name of the company is edited and that the appropriate indicator of the business type (Pty Ltd, Limited, PLC, LLC, etc) is retained.

Significant dates which are likely to be in the public domain, such as dates of birth, marriage and death, should be reduced to the year only where possible, or month and year if necessary. It is not usually necessary to anonymise dates of separation, court-related dates, dates of personal conflicts, etc.

Geographical information such as residential and business addresses can be anonymised using such terms as "the former matrimonial home", "the rural property", "overseas". Again, particularly in more complex decisions, it may be necessary to use letters combined with contextual descriptors. In this era of global business and internet romance, it is important to note that the anonymisation of overseas countries is very much dependent on context – for example, the requesting country in a Hague Convention judgment about international child abduction is not anonymised, given that the decision relates to international jurisdictional issues.

Unique numerical identifiers (vehicle registration, credit card number, phone number, property folio number, ABN numbers, etc) are highly identifiable online, and should always be either replaced by an ellipsis, or an ellipsis and the last digit(s) of the number.

Other identifying details (occupation, sports clubs, religion, volunteering, politics, recreational pursuits, etc) are anonymised as required using generic descriptions or letters.

Quotes from other proceedings involving the same parties, including from proceedings in other jurisdictions, are anonymised, with any changes enclosed in square brackets. Particular care needs to be taken where quotes are from other jurisdictions – it may not be possible to anonymise such quotes sufficiently to prevent identification by a skilled internet searcher. In that case, permission may be sought from the judge to omit part or all of the quoted text

with an appropriate notation (eg “Sentencing reasons omitted to comply with *Family Law Act 1975* (Cth) s 121”).

Recognising and anonymising contextual information risks

Contextual information in the form of apparently innocuous facts that in and of themselves would not be identifying but that can, in combination with each other, become identifying, may be difficult to recognise when anonymising judgments. This problem is compounded by the power of internet search engines to crawl across diverse unrelated websites and harvest relevant information.

Contextual information challenges may arise simply out of the use of language that is specific to a particular occupation or circumstance. For example, there is no point anonymising an occupation related to the military where one party has been dismissed from the service, without then anonymising the term “dishonourable discharge”.

A further challenge is faced where there is media coverage, unrelated to the family law proceedings, which enables the astute online searcher (be he/she media reporter, extended family member, child’s school friend, or local neighbourhood gossip) to identify the parties and their children. One example will suffice – an interlocutory judgment was published by the Family Court wherein one of the parties was an international sportsman who was the recipient of some lucrative sponsorship deals. The judge was contemplating how sponsorship deals should be dealt with in the context of property settlement and that piece of information could not be anonymised without impacting on the integrity of the reasons. Unfortunately, “sportsman” and “sponsorship” were sufficient for a well-known media outlet to generate stories about the case which, while they complied with the letter of the law by not actually naming them, provided sufficient detail for their readership to identify the parties.

The onus of recognising and resolving contextual information risk lies with the judgments officer undertaking the anonymisation. Recognition is facilitated by maintaining awareness of diverse current events and the application of lateral thinking. Resolution may involve editing the information to make it less

identifiable, or it may involve discussions with the relevant judicial officer to negotiate a solution.

Anonymisation keys

Consistent anonymisation promotes the ability to read multiple judgments in the same matter without having to constantly revise "who's who" and "what's what", thus making the judgments more user friendly and accessible for research purposes.

To facilitate consistent anonymisation, the JPO compiles and maintains running sheets (aka anonymisation keys) to record words and phrases that are edited in the course of anonymisation. Essentially each key is a Microsoft Word document containing a two column table, linking changes made from the original to the anonymised version. The keys are stored on a shared drive, making them accessible to all JPO staff and can be provided to other Court staff on request.

The keys ensure anonymisation is applied consistently throughout the life of a matter, regardless of the number of judgments delivered in that matter. Once the key is created, it can be added to as necessary when later judgments in that matter are anonymised.

Transparency – public access v parties' and children's privacy

The internet is a powerful platform for courts to publish their judgments, providing access and transparency in decision-making to the profession and the wider community. For courts with family law jurisdiction, however, the internet brings with it some unique challenges.

"Jigsaw identification"[1] is the identification of a person, achieved by combining two or more pieces of information (eg a party's occupation and his/her conviction of a criminal offence) from two or more sources (eg a judgment and a google search). It poses a particular problem where either or both of the

[1] *H v A (No.2)* [2015] EWHC 2630 (Fam)

parties have been involved in activities that have resulted in them acquiring a high level media profile. That profile may result from involvement in criminal proceedings but may equally arise from involvement in philanthropy, high society, elite sports, or any other circumstance that leads to media reporting.

Use of social media such as Facebook or Twitter, either deliberately (as a means of disparaging the other party) or inadvertently (recording personal news and events), can also put highly identifiable personal information in the public domain in a way that was not previously possible. And it is not unknown for an unhappy litigant to seek validation by creating a personal website to vent their dissatisfaction. Such online activity can render successful anonymisation of judgments extremely difficult, especially where reference to that activity itself features within the judgment.

In the family law online environment the demand for public access to judgments competes with the statutory requirement for privacy. In the anonymisation process, securing the parties' privacy vies with the need to maintain the integrity of the reasons – if anonymising the judgment sufficiently to prevent identification undermines or destroys the integrity of the judicial officer's reasons, then publication is a futile exercise.

In applying an approach of "must retain if ratio, may omit if obiter", it is essential that JPO staff are able to recognise when anonymisation threatens to encroach on the integrity of the reasons, at which stage the judicial officer will need to be informed/consulted. In that situation, the judge will decide whether or not the offending information can be properly omitted.

Conclusion

Since 2007 the Family Court of Australia has endeavoured to publish as many of its judgments as possible. It has provided the extra resources required to enable it to do so in compliance with the requirements of the *Family Law Act 1975* (Cth) s 121. When unforeseen problems have arisen, they have been recognised and resolved. The learning thus acquired has added to the knowledge base of the Judgments Publication Office and is applied constantly in the complex and challenging exercise of anonymisation.

Online publication of its judgments enables the Family Court to make them widely accessible to the public and the profession, and logically extends the transparency inherent in its operation as an 'open' court. At the same time, parties can be reassured that the Court makes every effort to protect their privacy. Many problems have been addressed since 2007 but, given the constantly evolving online environment, I am sure there will always be more!