The New Zealand Herald
HERALD ON SUNDAY
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Chairperson
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NEW ZEALAND

Dear Madam

We wish to strenuously protest the draconian suppression rules the Teachers Council Disciplinary Tribunal recently seems to have decided to highlight and, potentially, enforce.

The *Herald on Sunday* has been advised the Teachers Council has discussed enforcing a little-known rule that appears to prohibit publication of tribunal hearings and decisions. This blanket rule turns the basic constitutional presumption of open justice and accountability on its head.

Rule 32(1) of the New Zealand Teachers Council (Conduct) Rules 2004 ('the Rules') was put in place in 2004. The newspaper understands the Council has the authority, under section 139AJ of the Education Act 1989 to make rules providing for:

(a) A Disciplinary Tribunal to conduct hearings relating to misconduct by, and convictions of, individual teachers, and to exercise the powers given under [the Education Act]; and
(b) The practices and procedures of the disciplinary bodies.

However, in our view, rule 32 was not enacted in accordance with proper procedure, is contrary to the clear intent of the Education Act, is accordingly *ultra vires* and can only be described as being the very antithesis of public interest.

Procedural irregularity

It appears that section 139AJ(3) of the Education Act 1989 ('the Act') was not complied with at the time rule 32 was promulgated. Section 139AJ(3) of the Act provides that:

> "When preparing rules [under s139AJ] (and any amendments to them), the Teachers Council must take all reasonable steps to consult with those affected by the rules."

The media are clearly affected by the enactment of rule 32. As the media were not made aware of the proposed rule 32, and nor did the Teachers Council seek to publicise it prior to enactment of the Rules, it appears clear that the statutory requirements for effective promulgation of rule 32 were not complied with. As a result, in our view, rule 32 is subject to procedural irregularity and is accordingly *ultra vires*.

Contrary to intent of Education Act

It is clear from section 139AZ of the Education Act that suppression of information derived from hearings before the Disciplinary Tribunal was intended to be dealt with by the Disciplinary Tribunal itself, by specific orders on a case by case basis, and not by a blanket suppression rule made by the Teacher's Council.

In our view, a proper reading of section 139AZ indicates that rule 32 of the Rules is *ultra vires* and should be rescinded.

Contrary to the public interest

We understand that a warning notice was posted on the Teachers Council Disciplinary Tribunal website late last year, stating the following:

> *These decisions are protected by a restriction of publication under section 32(1) of the New Zealand Teachers Council (Conduct) Rules 2004.*
>
> *No person or organization may publish any report or account of a hearing, publish any part of any document, record, or other information produced at a hearing, and/or publish the name, or any particulars of the affairs, of any party or witness at a hearing.*

Prior to the appearance of this notice we understand that no enforcement of rule 32 has been undertaken by the Disciplinary Tribunal or the Teachers Council.

This prohibition is one of the heaviest shrouds of secrecy over any statutory disciplinary body in New Zealand, and indeed is comparable to Youth Court suppression rules in its breathtaking scope. It is recognised that the wide ranging and peculiar suppression rules in the Youth Court are required for the protection of the particularly sensitive young subjects of such proceedings. Teachers are not young people or people in respect of which there is any particular concern or need for protection. Blanket suppression is not required for disciplinary proceedings concerning teachers.

In a case before the Auckland District Court last November, the *Herald on Sunday* sought transparency in a situation where a teacher aide was seeking suppression.

Judge Thomas Everitt ruled: "Parents are entitled to know the police believe something untoward went on ... There is significant public interest in naming the school and the fact that a person employed by the school has been charged with these offences, knowledge most parents will responsibly use."

That decision was fully in line with the law in relation to the importance of open justice, in respect of which the Court of Appeal has said "in the end justice in a free society depends on its open administration".

The media has an important constitutional role to play in giving effect to the principle of open justice by reporting the proceedings and outcomes of disciplinary tribunals. In doing so the media acts as a surrogate of the public in order to provide the essential public scrutiny to ensure the open administration of justice. The Courts have repeatedly recognised that the public interest is served by openness in the administration of justice and that this helps meet the need to preserve public confidence in the system.

Concealing all matters of discipline involving teachers is a complete removal of the ability to inform communities that serious misdemeanours are being dealt with in a proper manner. The protection of our children while under the care and supervision of schools strikes to the heart of every parent. There can be few, if any, matters of greater public concern.

The principle of open justice applies to:

- Disclosure of a defendant's name, in order that they may be held accountable if found guilty, and vindicated if not. Schools and parents are entitled to know of any blemish on a teacher's copybook, in order to make informed decisions.
- Disclosure of the school at which the alleged misconduct happened, in order that the school and community may join in an informed discussion with the school about its safeguards.
- Transparency throughout the disciplinary process, in order that justice may not just be done, but also be seen to be done.

We submit the presumption should always be in favour of transparency. Suppression of specific information before the Disciplinary Tribunal, and the Tribunal's decisions, should be set in place only when it is required to, for instance, protect the identity of a child victim.

We commend to you the Law Commission's report, *Suppressing Names and Evidence,* (2009) which says:

> *The principle of open justice and the right to freedom of expression have been described as rights that go to the very existence and health of our political and legal institutions.*

The Law Commission formally recommended the "starting point" for considering publication of evidence and names should be a presumption of open justice, and that name suppression should only be granted on specified grounds.

Justice Minister Simon Power, in introducing law changes to protect the principles of open justice (October 2010), emphasised the importance of opening the courts to the media as representatives of the public, putting an end to interim suppression orders without specific grounds and evidence, and providing the media the opportunity to be heard if a court is considering setting in place any suppression order.

These principles are equally applicable to hearings before the Teachers Council Disciplinary Tribunal.

The recent change to suppression law also extended the scope of automatic suppression for child witnesses and child victims, and the *Herald on Sunday* would endorse the application of equivalent rules to serious matters before the Disciplinary Tribunal.

The *Herald on Sunday* respectfully requests the Teacher's Council revisit and rescind Rule 32(1), and in the meantime revert to the previous position of not seeking to enforce it.

Please acknowledge this letter and inform us of the Council's response at the earliest opportunity. If the Teacher's Council is not minded to approach this matter in the manner suggested above, it may be necessary for a notice of motion to be filed in Parliament seeking the annulment of the rule under the Regulations (Disallowance) Act 1989. We are duty-bound to resist attempts to cloak such serious matters from those whose right to know must be vigorously defended.

Yours sincerely

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Bryce Johns
Editor
Herald on Sunday