

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA701/2023
[2024] NZCA 340**

BETWEEN CHRISTIAN CONGREGATION OF
JEHOVAH'S WITNESSES
(AUSTRALASIA) LIMITED
Appellant

AND ROYAL COMMISSION OF INQUIRY
INTO HISTORICAL ABUSE IN STATE
CARE AND IN THE CARE OF FAITH-
BASED INSTITUTIONS
First Respondent

ATTORNEY-GENERAL
Second Respondent

Court: Goddard and Cooke JJ

Counsel: E J Engwirda for Appellant
No appearance for First Respondent
J N E Varuhas and R E R Gavey for Second Respondent

Judgment: 23 July 2024 at 3.00 pm
(On the papers)

**JUDGMENT OF THE COURT
(Interim Relief)**

- A The application for interim relief is declined.**
- B The appellant must pay costs to the second respondent for a standard application on a band B basis, with usual disbursements.**
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REASONS OF THE COURT

(Given by Cooke J)

CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES (AUSTRALASIA) LIMITED v ROYAL COMMISSION OF INQUIRY INTO HISTORICAL ABUSE IN STATE CARE AND IN THE CARE OF FAITH-BASED INSTITUTIONS [2024] NZCA 340 [23 July 2024]

[1] This Court delivered a judgment on 24 April 2024 dismissing the appellant's appeal.¹ The appellant has applied for leave to appeal to the Supreme Court. That application is yet to be determined. In the meantime, the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-Based Institutions (the Royal Commission) has completed its inquiries and its report (the Report) is scheduled to be tabled in the House of Representatives tomorrow, Wednesday 24 July 2024. The appellant now seeks interim orders in the following terms:

... that part of the final report that is referred to as a Case Study on Jehovah's Witnesses (the **Case Study**):

- (a) not be published on the Commission's website, as is contemplated in cl 39 of the Commission's Terms of Reference; and
- (b) be kept confidential and not otherwise published, referred to, reported on, or disclosed;

until the appellant's appeal in this proceeding to the Supreme Court (SC 50/2024) is decided and subject to the terms in which the appeal is decided.

[2] The application was filed in this Court last Friday, 19 July 2024. Submissions were then filed in accordance with a timetable set by the Court. It was agreed that the application could be determined on the papers.

[3] The application is made under r 30(2)(b) of the Supreme Court Rules 2004. The principles to be applied under such rules are generally well settled.² Given that the present application is for interim relief in relation to an application for judicial review under the Judicial Review Procedure Act 2016, we consider it appropriate to apply those principles in light of the general approach to interim relief under that Act. This involves considering whether an order is necessary to preserve the position of the appellant, and, if so, whether relief is appropriate given all the repercussions, public or private, of granting relief. The apparent strength or weakness of the proposed appeal is also relevant.³

¹ *Christian Congregation of Jehovah's Witnesses (Australasia) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-Based Institutions* [2024] NZCA 128 [Substantive appeal judgment].

² *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2020] NZCA 186, (2020) 25 PRNZ 341 at [5]–[6], citing *Keung v GBR Investment Ltd* [2010] NZCA 396, [2012] NZAR 17 at [11].

³ *Minister of Fisheries v Antons Trawling Co Ltd* [2007] NZSC 101, (2007) 18 PRNZ 754 at [3] and [8], referring to *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) at 430.

[4] We do not outline the relevant circumstances which are set out in our earlier judgment.⁴ No affidavit evidence was filed by the appellant in support of the application. We nevertheless accept that the appellant has a position to preserve. Publicising the section of the Report dealing with the issue of abuse by members of the Jehovah's Witnesses faith will likely have a reputational impact on the appellant, and the faith more generally. Any subsequent decision of the Supreme Court concluding that it was beyond the jurisdiction of the Royal Commission to make such findings may mitigate that impact, but would not eliminate it. Having said that, we do not understand there to be a dispute that the Royal Commission received evidence of abuse engaged in by members of the Jehovah's Witnesses faith. The appellant's argument in this proceeding has been limited to arguing that the Royal Commission does not have jurisdiction to investigate and report on that abuse because it did not take place in a relevant "care" setting. But we nevertheless accept that the proposed order can be seen as necessary to preserve the appellant's position.

[5] Notwithstanding that conclusion, however, there are factors that mean that interim relief would not be appropriate in this case.

[6] First, the appellant's prospects of success must be regarded as low. The challenge to the Royal Commission's ability to inquire into abuse by members of the Jehovah's Witnesses faith has been dismissed by both the High Court and this Court.⁵ To succeed in the Supreme Court, the appellant must first persuade the Supreme Court that leave to appeal should be granted, and then that the lower Courts erred. The appellant's appeal would need to succeed on both the claims that it has advanced: first, that the Royal Commission's inquiries in relation to the Jehovah's Witnesses were outside the Terms of Reference as initially formulated; and secondly, that the amendment of the Terms of Reference to remove any doubt about that question was unlawful and should be set aside. We accept that it may still be possible to say the

⁴ Substantive appeal judgment, above n 1, at [4]–[20].

⁵ *Christian Congregation of Jehovah's Witnesses (Australasia) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-Based Institutions* [2023] NZHC 3031; and Substantive appeal judgment, above n 1.

appellant has an arguable case on appeal, but it cannot be regarded as a very strong one in those circumstances.⁶

[7] Secondly, the finalisation and publication of the Report is a matter of considerable public interest. This has been a long-running inquiry in relation to matters that have had a significant impact on many people's lives, in particular the survivors of abuse. There would need to be very compelling reasons before it would be appropriate for a court to prevent publicity over part of the Report in those circumstances. We recognise that the appellant is only seeking to prevent publication of those parts of the Report that relate to the Jehovah's Witnesses. But even if it were possible to separate out and suppress part of the Report in that way, we consider it would be wrong to do so. We consider that a report of this kind likely involves interrelated issues applying across state and faith-based care. The inquiries concerning the Jehovah's Witnesses form part of an overall story which is properly told in the public interest.

[8] It is also relevant that the appellant has waited until the very last moment to make this application. The Report has been finalised and will be tabled in the House of Representatives tomorrow. The appellant has not previously sought interim relief in this proceeding. It did not do so when it filed its application for leave to appeal to the Supreme Court on 23 May 2024. It would have been readily apparent to the appellant that it would not have been able to have an appeal to the Supreme Court heard and determined before 26 June 2024, when the Royal Commission was scheduled to deliver the Report. The Report was then delivered to the Governor-General on 25 June. On 22 June 2024, the appellant was advised that the Report would be tabled in Parliament on 24 July 2024. But no application for interim relief was made at that time. Nor was any interim relief preventing publication of the Report sought in the separate proceedings the appellant has brought in CIV-2024-404-1487. Any application for interim relief should have been made at a much earlier time. That strongly counts against the grant of any interim orders.

⁶ The appellant referred to a further judicial review challenge it has advanced challenging the Royal Commission's decisions, but that proceeding is not before us — see *Christian Congregation of Jehovah's Witnesses (Australasia) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-Based Institutions* [2024] NZHC 1691.

[9] Finally, we have concerns about the form of the orders sought. We do not accept the Attorney-General's submission that there is no jurisdiction to make orders against the Royal Commission after it has reported on the basis that it is *functus officio*. Most challenges to the findings of commissions have been pursued after they have reported.⁷ Orders could still be made against the Royal Commission, including order (a) above. But order (b) above would also appear to be directed to third parties, such as media outlets. That may not eliminate jurisdiction to make such an order, but the wide and potentially uncertain nature of such orders count against them being made.

[10] Moreover, the orders sought raise significant comity issues, as the Attorney-General submits. The Report is to be tabled in the House of Representatives as contemplated by the Terms of Reference. An order could not properly prevent the publication of materials tabled in Parliament, or discussion and debate about the content of the Report in Parliament and public reporting of that discussion and debate.

[11] We do not accept the appellant's submission that such an order is contemplated by the Speaker's rulings concerning material tabled in Parliament that is subject to confidentiality orders of the Court.⁸ It is elementary that any decision concerning publication of a tabled paper is for Parliament, and any publication under the authority of Parliament would be absolutely privileged.⁹ For this Court to make any order preventing publicity over part of the Report relating to the Jehovah's Witnesses after that Report had been tabled in Parliament, in the broad terms sought by the appellant, would not be consistent with the comity between the judicial and legislative branches of government and would not be consistent with the Parliamentary Privilege Act 2014.

[12] There is also force in the Attorney-General's submission that in circumstances where the orders sought would affect the way in which the Report is dealt with by Parliament, the Speaker ought to have been named as a respondent and heard on the application. But this merely underscores the point that the orders sought would amount to an impermissible interference with the legislative branch of government.

⁷ See, for example, *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662 (PC).

⁸ Speaker's Rulings 2023, 163/1.

⁹ Parliamentary Privilege Act 2014; and see Speaker's Rulings 2023, 163/1.

Result

[13] The application for interim relief is declined.

[14] The appellant must pay costs to the second respondent for a standard application on a band B basis, with usual disbursements.

Solicitors:

Fortune Manning, Auckland for Appellant

Te Tari Ture o te Karauna | Crown Law Office, Wellington for Second Respondent