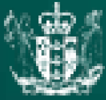

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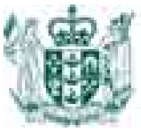
SUPPRESSING NAMES AND EVIDENCE



LAW·COMMISSION
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SUPPRESSING NAMES AND EVIDENCE

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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This review forms part of the Criminal Procedure (Simplification) project being conducted jointly by the Law Commission and the Ministry of Justice. This Issues Paper has been prepared by the Law Commission. The Commissioners in charge of this project are Warren Young and Val Sim. The legal and policy adviser for this Issues Paper was Rachel Hayward. Our thanks to Roderick Mulgan for his contribution to the research for this paper.

Call for submissions

Submissions or comments on this issues paper should be sent to the Law Commission by ***Friday 13 February 2009***.

Suppression submissions
Law Commission
PO Box 2590
Wellington 6140

email – suppression@lawcom.govt.nz

Any inquiries may be made to ***Rachel Hayward, 04 473 3453***

There are a number of questions set out in this Issues Paper, on which we would welcome your views. Your submission or comment may be set out in any format, but it is helpful to indicate the number of the question, or the paragraph of the Issues Paper, to which you are referring.

This Issues Paper is available on the Law Commission's website, at http://www.lawcom.govt.nz

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The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Law Commission will normally be made available on request, and the Commission may refer to submissions in its reports. Any requests for the withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.

Suppressing Names and Evidence

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Chapter 1

Introduction

AIM OF THIS REVIEW

1.1 The principle of public access to the courts is an essential element of our system of justice.[1] The principle requires, as a general rule, that the courts conduct their business publicly unless this would result in injustice.[2] Open justice has been regarded as an important safeguard against judicial bias, unfairness and incompetence, ensuring that judges are accountable in the performance of their judicial duties.[3] It is also thought to maintain public confidence in the impartial administration of justice by ensuring that judicial hearings are subject to public scrutiny, and that: "Justice should not only be done, but should manifestly and undoubtedly be seen to be done".[4]

1.2 Open justice is particularly important in criminal trials, where the liberty of the accused may be at stake. It requires that proceedings should be held in open court, to which the public and press are admitted, and in criminal cases, that all evidence communicated to the court is communicated publicly. The principle also requires that nothing should be done to discourage publication to a wider audience of fair and accurate reports of proceedings that have taken place.[5]

1.3 Open justice has also been described as improving the quality of court testimony by disinclining witnesses to tell anything other than the truth.[6] It makes the judicial system more transparent and comprehensible to the public. This can reassure those associated with both the accused and victims that the trial has been

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1 *Broadcasting Corporation of New Zealand v AG* [1982] 1 NZLR 120, 122 per Woodhouse P. The principles of open justice have been recognised and applied by the New Zealand courts in a number of other decisions, including *Police v O'Connor* [1992] 1 NZLR 87; *Television New Zealand Ltd v R* [1996] 3 NZLR 393, 396 – 397; *Surrey v Speedy* (1999) 13 PRNZ 397; *Elworthy-Jones v Counties Trustee Co Ltd* [2002] NZAR 855, 860; *Muir v CIR* (2004) 17 PRNZ 365 (CA); and *Television New Zealand Ltd v Mafart & Prieur* (15 April 2005) High Court, Auckland, Simon France J.

2 *Scott v Scott* [1913] AC 417 (HL).

3 *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 449 – 450 per Lord Diplock; *Elworthy-Jones v Counties Trustee Co Ltd* above n 1. See also Hon JJ Spigelman "Seen to be done: the Principle of Open Justice" (2000) 74 ALJ 290 (Part I); 378 (Part II).

4 *R v Sussex JJ ex p McCarthy* [1924] 1 KB 256, 259 per Lord Hewart.

5 *Attorney-General v Leveller Magazine*, above n 3, 450, per Lord Diplock.

6 *R v Mahanga* [2001] 1 NZLR 641, para 18 (CA).

conducted fairly and the accused treated justly.[7] The right to a fair and public hearing is affirmed in Article 14(1) of the International Covenant on Civil and Political Rights,[8] and in section 25 of the New Zealand Bill of Rights Act 1990.[9]

1.4 Section 14 of the New Zealand Bill of Rights Act 1990 elevates to constitutional status the right to freedom of expression, including the freedom to seek, receive and impart information and opinions, of any kind, in any form.[10] Section 5 of that Act provides that the rights and freedoms contained in the Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Recent New Zealand decisions have increasingly referred to the right to freedom of expression as a justification for the open justice principle,[11] although the courts have described the two as still being distinct considerations: open justice is primarily concerned with the sound functioning of the judicial process in the public interest, whereas freedom of speech is more concerned with the free flow of information.[12]

1.5 But the principle of open justice is not absolute. There are exceptions to it, which result from an even more fundamental principle that the chief object of courts of justice must be to secure that justice is done.[13] Situations sometimes arise in which doing justice in public would frustrate justice itself. In *Scott v Scott*, the House of Lords stated that it was generally for Parliament and not the courts to determine the exceptions to the open justice principle, but exceptions have in fact been developed by both the courts and the legislature.

1.6 Sections 138 to 141 of the Criminal Justice Act 1985 are statutory mechanisms designed to respond to the risks to the interests of justice which might arise from an entirely open judicial system. These are by no means the only statutory exceptions to the principle of open justice: public access to the courts or to reports of court proceedings are restricted or controlled by a number of other

---

7 Ibid.

8 Article 14(1) was ratified by New Zealand in 1978. It provides: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

9 Section 25(a) of the New Zealand Bill of Rights Act 1990 provides: "Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: (a) The right to a fair and public hearing by an independent and impartial court…"

10 The right is also confirmed in the Universal Declaration of Human Rights (UDR) and the International Covenant on Civil and Political Rights (ICCPR), ratified by New Zealand in 1978. See G Huscroft and P Rishworth eds *Rights and Freedoms The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993*, Brooker's, Wellington, 1995, chapter 5.

11 See *R v Liddell* [1995] 1 NZLR 538, 546 (CA); *Television New Zealand v R*, above 1, 395 – 397 (CA); *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, 558 (CA); *R v Mahanga* above n 6; *R v Burns (Travis)* [2002] 1 NZLR 387, 403 – 405 (CA).

12 *TVNZ v Rogers* [2008] 2 NZLR 277, para 117 and following, McGrath J.

13 *Scott v Scott*, above n 2, per Viscount Haldane, 437.

enactments.[14] There have been statutory provisions in New Zealand allowing for the suppression of name or evidence, or providing for the exclusion of people from the court, since the early 1900s.[15]

1.7 For ease of reference, the provisions of sections 138 to 141 are set out in full in Appendix B of this Issues Paper. In summary:

(a) Section 138 contains powers to clear the court, forbid publication of any report or account of the evidence adduced or submissions made, and forbid publication of the name or identifying particulars of any witness.

(b) Section 139 prohibits the publication of the name or identifying particulars of the victim in certain sexual offences.

(c) Section 139A prohibits the publication of the name or identifying particulars of any person under the age of 17 who is called as a witness in criminal proceedings.

(d) Section 140 gives the court a broad discretion to prohibit publication of the name and identifying particulars of any person accused or convicted of an offence, or of any other person connected with the proceedings.

(e) Section 141 provides for exceptions in relation to publication by or at the request of the police, or to other officials in relation to their official duties.

1.8 The review of these provisions of the Criminal Justice Act 1985 forms part of the Criminal Procedure (Simplification) project being conducted jointly by the Law Commission and the Ministry of Justice, but given the relatively discrete nature of the issues involved, the Ministry of Justice and the Law Commission agreed that this part of project should be the subject of a separate issues paper. The question of suppression is of particular interest to members of the media, who have expressed concern about a number of matters, including a perceived increase in the use of suppression orders (in District Courts in particular), problems in getting access to the terms of suppression orders, and in the way those orders are sometimes framed, and inconsistencies in media standing to challenge orders. In recent months, the way in which the Internet affects suppression orders has also been the subject of some high-profile decisions.

1.9 The aim of this Issues Paper is to elicit comment and submission as to whether the suppression provisions of the Criminal Justice Act 1985 are appropriate: do they impinge too far on the principle of open justice, or do they not offer enough protection when risks to the interests of justice arise? In this paper we examine the suppression of evidence, suppression of names of accused people, witnesses and victims, and the grounds on which the court may be closed. We look at the challenges posed by the Internet, and consider issues relating to the way in which the provisions of the Act currently operate. We describe the current law, and the approach that the courts have taken in each of these areas

14 For example, the Children, Young Persons and their Families Act 1989, the Bail Act 2000, the Evidence Act 2006, and the Summary Proceedings Act 1957.

15 In 1905, section 3 of the Criminal Code Amendment Act allowed the court to exclude all or any people from the court in the interests of public morality, with the exception of the prosecutor, the accused and his counsel, or any accredited newspaper reporter. Section 4 of the same Act allowed the court to forbid the publication in any such case of a report or account of the whole or part of the evidence. In 1920, section 9 of the Offenders Probation Act gave the court a discretion to prohibit the publication of the name of any person without previous convictions who was accused of an offence. The broad discretion to suppress names appears to date from section 46 of the Criminal Justice Act 1954.

to date, and identify a number of issues that have arisen from the cases, our research, and our preliminary consultation in this review. There is considerable overlap and duplication between sections 138, 139 and 140. In our view, these sections require complete revision.

1.10 We discuss the provisions of the Act and the issues raised by considering the types of information that may be suppressed, namely:

- suppression of evidence
- suppression of names of accused and convicted persons
- suppression of names of victims
- suppression of names of witnesses
- suppression of names of others affected by proceedings.

1.11 In each of these categories, we ask whether open justice is the appropriate starting point and if so, the circumstances that might override it. It is perhaps worth stating the obvious counterfactual – what would be lost if these provisions of the Criminal Justice Act 1985 were repealed and nothing was suppressed? As will become apparent from this Issues Paper, on any view of the matter, there are some things that need to be suppressed – the question is how often, and in what circumstances.

1.12 We also consider the related question of the circumstances (if any) in which the court should be empowered to close the court to ensure the effectiveness of suppression orders.

1.13 We then turn to consider a range of other issues raised by the provisions of the Criminal Justice Act 1985 and the way in which these operate in practice, including:

- who has and should have standing to challenge a suppression order
- whether there should be a national register of suppression orders
- the meaning of "publication"
- the challenges posed by the Internet
- whether breach of a suppression order should be a contempt of court
- whether the current offence and penalty regime for a breach of a suppression order requires amendment
- the effect of the In-Court Media Coverage Guidelines 2003.

1.14 In relation to all of the issues raised, we pose questions on which we invite submissions.

Chapter 2

Suppression of evidence

GROUNDS FOR SUPPRESSION OF EVIDENCE

Is open justice the appropriate starting point?

2.1 In our view there are compelling reasons for a powerful presumption of openness in relation to the hearing of criminal proceedings and the evidence adduced and submissions made during a hearing. The criminal law gives the state immense power over an individual's freedom. Access to criminal proceedings, to the charges, the evidence, the submissions, and the judgment of the court all contribute to providing a check on the deprivation of personal liberty. Openness provides a safeguard against judicial arbitrariness, and reassures the public that the powers of the state are being applied in accordance with the laws made by Parliament.[16] It is, in short, a fundamental element of the rule of law that should be departed from only sparingly and on clearly articulated grounds.

Current grounds

2.2 Under section 138(2) of the Criminal Justice Act 1985, the court may restrict access and forbid publication of details of proceedings or particulars of witnesses only where the court is of the opinion that it is required in the interests of justice, of public morality, of the reputation of any victim of any alleged sexual offence or offence of extortion, or of the security or defence of New Zealand.

2.3 These criteria are potentially broad, but an order made under the section should be no wider in its terms than is necessary to ensure the due administration of justice.[17] An order must be explicit and clear in its terms, so the media know what they can and cannot publish, and the reasons for making the order should be spelt out.[18] Orders under section 138(2) may be made for a limited period or permanently.[19]

16 C Bayliss "Justice done and justice seen to be done – the public administration of justice" (1991) 21 VUWLR 177, 184.

17 *Police v O'Connor* [1992] 1 NZLR 87, 104.

18 Ibid, 104 – 105.

19 Criminal Justice Act 1985, s138(4).

2.4 In approaching the question of whether a suppression order should be made, a court must proceed on the assumption that responsible editors will ensure fair and accurate reporting of evidence given at a preliminary hearing, and that responsible editors will ensure a balanced account is published and take account of the possibility of sensational material adversely influencing a jury.[20]

2.5 We turn to consider whether the grounds set out in section 138(2) of the Act are still the appropriate grounds for suppression of evidence, and whether there are other grounds that should be added.

Appropriateness of the current grounds

Public morality

2.6 In New Zealand, there has been a statutory power to forbid the publication of any report or account of the evidence in a trial in the interests of public morality since 1905.[21] Public morality is seldom used as a ground for an order under section 138 of the 1985 Act. Where evidence of a sexual nature is suppressed, it is usually on the grounds of the protection of the victim, rather than of public morals.[22] Though the International Covenant on Civil and Political Rights recognises "public morals" as an acceptable basis for departing from open justice, the availability of the section 138 powers for reasons of public morality seems both archaic and paternalistic. We find it difficult to envisage any situations where the interests of public morality would override open justice. We seek views on whether this remains a useful or appropriate ground.

Reputation of victims of sexual offences and extortion

2.7 There are a number of difficulties with this ground. There is no definition of 'extortion' in the Criminal Justice Act 1985. We assume the term refers to the crime of blackmail under section 237 of the Crimes Act 1961 and possibly, depending on the circumstances, the crime of demanding with intent to steal under section 239. The rationale for protecting victims of these offences appears to be that their essence is the threat of making accusations against the victims to obtain a benefit. Such victims may be reluctant to report the crime if the subject matter of the extortion was to be widely known. However, it is difficult to see why a victim of extortion can be said to be more deserving of protection to his or her reputation than other crime victims, merely because he or she has been threatened with disclosure of matters that may affect his or her reputation.

2.8 Moreover, it is by no means certain that extortion is confined to sections 237 and 239. It might also extend to robbery and aggravated robbery under sections 234 and 235, since the word "extort" is used in the definition of robbery. At the least, this creates an undesirable ambiguity.

20 *Curtis v Police* [2008] DCR 259, para 23.

21 Criminal Code Amendment Act 1905, s 4. The interests of public morality was the only ground provided in the statute for suppressing evidence.

22 C Bayliss, above n 16, 197.

2.9 The singling out of sex offence victims as a category whose reputation needs greater protection than most other crime victims is even more problematic. It conveys the unfortunate impression either that sexual offence victims are more likely to have bad reputations than other crime victims or alternatively that the mere fact of being a sexual offence victim will affect the person's reputation. Either way this may perpetrate undesirable myths and misconceptions about victims of sexual offences.

2.10 Again, therefore, we doubt whether this is an appropriate ground, at least in its current formulation.

Security or defence of New Zealand

2.11 This ground is similar to that previously contained in section 15(3) of the Official Secrets Act 1951, which allowed the prosecution to apply for an order excluding all or any portion of the public during any part of a hearing, on the ground that the publication of evidence would be prejudicial to the safety or interests of the state.

2.12 We consider that the public interest in protecting the security or defence of New Zealand is high and that this exception is plainly justified. There are comparable provisions under the Official Information Act 1982 and the Criminal Disclosure Act 2008 to protect information of this kind.

2.13 It has been suggested that there is a danger that this exception will be used when it is not essential, as it is not possible for the public to check whether evidence is likely to endanger the security and defence of New Zealand if the public and the media are excluded when that evidence is heard.[23] However, history demonstrates that this ground is not over-used – in fact it is almost never used. In our view, rights of appeal and/or review provide a sufficient safeguard against the misuse of this provision.

The interests of justice

2.14 "The interests of justice" has been held to refer to or include the administration of justice, as well as any particular interest which may require protection.[24] It may also include issues of fairness to the accused.[25]

2.15 We consider the 'interests of justice' test remains a useful ground because it allows the court to consider a broad range of factors and make such orders as the justice of the situation requires. Nevertheless, the concept of the 'interests of justice' is inherently vague and indeterminate. Different judges may reach different conclusions about the interests of justice in similar cases. We consider it desirable that the legislation give as much guidance as possible about the circumstances that might override open justice. However we also consider that there is a need for a residual ground, to cover unforeseen cases, and that the interests of justice test remains useful in this regard.

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23 Ibid 198.

24 *Police v O'Connor*, above n 17, 96. The Court concluded in that case that "the interests of justice" could not encompass a form of punishment or sentencing, including any means of preventing or attempting to prevent re-offending.

25 *R v McClintock* [1986] 2 NZLR 99, 101; *Attorney-General v B* [1992] 2 NZLR 351, 360; *R v Burns (Travis)* [2002] 1 NZLR 387, at 404.

2.16 On that basis we suggest, so far as possible, the legislation should identify the particular interests that may warrant the exercise of the powers and supplement them with a residual interests of justice test. We consider below what those grounds should be.

Additional grounds

The right to fair trial

2.17 The right to a fair trial according to law is a fundamental element of the justice system. It has been described as being as near an absolute right as any which can be envisaged.[26] Where freedom of expression and fair trial rights cannot both be fully assured, the courts have indicated that it is appropriate to temporarily curtail freedom of media expression so as to guarantee a fair trial.[27]

2.18 The concept of a fair trial has been said to defy analytical definition.[28] Professor David Paciocco has described the key aspects of a fair criminal trial as being that it is a public hearing before an independent and neutral judge, in which the prosecution has the burden of establishing its allegations against the accused beyond reasonable doubt. The independence and impartiality of the trier is thus essential in a fair trial, and the presumption of innocence equally important.[29]

2.19 It seems uncontroversial that where there is a risk of prejudice to a fair trial, the principles of open justice must be departed from. An issue arises as to the degree of risk that must be present before this occurs. In *R v Burns (Travis)*,[30] Thomas J suggested that the test was whether there was a 'significant' risk of prejudice to a fair trial. The Court of Appeal in *Gisborne Herald v Solicitor-General*,[31] a contempt case, used a "real risk of prejudice" test. Is there a difference between the two standards? The requirement of a "real" risk of prejudice suggests that, while the prejudice must not be fanciful, it could nevertheless be very small. Arguably, a "significant" risk is more ambiguous: according to the *Oxford Dictionary,* it could mean a risk which is not remote or insignificant, or alternatively a risk "of considerable amount or an effect of importance". On the latter meaning, a higher level of risk would be required to rebut the presumption of openness. We are therefore inclined to prefer the "real risk" test, because it provides both greater clarity and the appropriate threshold.

26 *R v Burns (Travis)*, above n 25, 404 – 405.

27 *Gisborne Herald Ltd v Solicitor-General* [1995] 3 NZLR 563, 575.

28 *Jago v District Court of New South Wales* (1989) 168 CLR 23, 57 per Deane J, cited in Hon Justice Badgery-Parker "The Criminal Process in Transition: Balancing Principle and Pragmatism – Part I" (1995) 4 JJA 171, 176.

29 D Paciocco "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991) 15 Crim LJ 315, cited in Hon Justice Badgery-Parker, above n 28.

30 *R v Burns (Travis)*, above n 25.

31 Above n 27.

Undue hardship to the victim

2.20 As we suggested earlier, there are difficulties with the current provisions relating to protecting the reputations of victims of extortion and sexual offences, including the absence of any clear rationale for favouring these two categories of victim. Nevertheless we consider there should be some power to suppress evidence where it adversely affects the interests of victims. Our tentative view is that the powers under section 138 to protect the interests of victims should be extended to the victims of all offences. We accept that challenges to witness credibility are an inherent feature of the adversarial process. These frequently relate to the character of a witness and can affect the reputation of victims and other witnesses. Generally, this process needs to occur in public to maintain public confidence in the system. The circumstances in which the court should suppress evidence to protect a victim's interests should be fairly rare. However, this does not mean that the court should not have the power to do so, should the circumstances so require.

2.21 We suggest an appropriate test would be one of 'undue hardship' to the victim. In this context, the meaning of "victim" should be consistent with section 4 of the Victims' Rights Act 2002, and should include a member of the immediate family of a person who, as a result of an offence committed by another person, dies or is incapable.[32] Undue hardship means something more than ordinary hardship.[33] Section 6 of the New Zealand Bill of Rights Act 1990 would require the court to interpret the term "undue hardship" consistently with the right to freedom of expression in section 14 of the Act. This would ensure an appropriate balance was struck between open justice and the interests of victims.

2.22 For example, if a case involved evidence of the detailed and sensitive financial circumstances of a victim, these may not be sufficiently central to the offending in the case to require publication in the public interest when weighed against the victim's interests in terms of privacy or damage to reputation. In such circumstances, the evidence might be suppressed on the grounds of undue hardship to the victim. Another example might be where there was particularly distasteful evidence, such as detailed descriptions of a dead body, likely to cause significant distress to the victim's family, and in which any public interest is merely prurient.

2.23 We note that there is an overlap between the current section 138(2) and section 375A(4) of the Crimes Act 1961, which provides for the court to prohibit publication of details of the criminal acts alleged in sexual cases, if the court is of the opinion that the interests of the complainant so require. Should the test of undue hardship be adopted instead? Our preliminary view is that the formulation of "undue hardship" is preferable to the formulation in section 375A(4) because the term "interests of the complainant" is too vague, and is too low a threshold. We seek views in this regard. Would a test of "undue hardship be difficult to employ in cases involving sexual offending? Is it sufficient to deal with instances of particularly distasteful evidence?

32 Unless that family member is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned – Victims Rights Act 2002, s4.

33 *Lyall v Solicitor-General* [1997] 2 NZLR 641.

The maintenance of the law

2.24 The maintenance of the law, including the prevention, investigation and detection of offences, is recognised as a ground for withholding information under both the Official Information Act 1982 and the Criminal Disclosure Act 2008. The issue arises as to whether there should be a similar ground for suppression of evidence. For example, it might be useful where enforcement agencies give evidence about the modus operandi of their investigations. While the accused would almost certainly need to be made aware of the evidence, widespread publication of it may not be in the public interest. Another example where this ground might be relevant would be in relation to evidence of criminal activity such as the details of the manufacture of drugs or explosives. In our view, the maintenance of the law should be a ground for suppression of evidence.

The safety of any person or persons

2.25 The Official Information Act 1982 and Criminal Disclosure Act 2008 also recognise as a ground for withholding information that disclosure would endanger the safety of any person. It is not difficult to envisage circumstances where the publication of evidence could create a risk of retribution, thereby endangering the safety of a victim or witness. We suggest that an appropriate ground for suppression of evidence is that publication would endanger the safety of any person.

Q1 Is open justice the appropriate starting point when considering publication of evidence? If so, on what grounds should it be able to be rebutted?

Q2 Do you agree that the following grounds are no longer appropriate:
- (a) public morality;
- (b) the protection of the reputation of victims of sexual offences and extortion?

Q3 Should the security or defence of New Zealand continue to be a ground for suppression of evidence?

Q4 Is protection of the right to a fair trial an appropriate ground? If so, what level of risk needs to be shown to rebut the presumption of open justice?

Q5 Are the following new grounds appropriate:
- (a) undue hardship to victims;
- (b) the maintenance of the law;
- (c) the safety of any person?

Q6 Is there a need for a residual ground for suppression of evidence? If so, is the "interests of justice" the appropriate test, or is there a more specific test which should be adopted?

Q7 Should the formulation of "undue hardship to the victim" be adopted in preference to the ground set out in section 375A(4) of the Crimes Act 1961 (which provides for the court to prohibit publication of details of the criminal acts alleged in sexual cases, if the court is of the opinion the interests of the complainant so require)?

Breadth of orders to suppress evidence

2.26 Under section 138(2)(a), a court may make an order forbidding publication of any report or account of the whole or any part of the evidence adduced, or the submissions made.

2.27 How far does this subsection extend? Could it extend to suppressing matters such as the nature of the charges? The authors of *Media Law in New Zealand* note that there is no clear authority on the validity of "blanket suppression orders", which prohibit publication of any details of the case at all.[34] However, the High Court might use its inherent jurisdiction to make orders wider than those available under section 138.[35]

2.28 In *Broadcasting Corporation v Attorney-General* (which was decided before the passage of the Criminal Justice Act 1985, under earlier legislation) the Court of Appeal expressed concern at the extreme scope of the order at issue in the proceedings, noting that a "total blackout upon everything that had taken place" in court was difficult to envisage, and that such an order would be only rarely justified.[36] In that case an order had been made by the High Court that the proceedings not be included in the list of court business for the day; members of the public including accredited media were excluded; no announcement was made in court of the identity of the offender, the nature of the offence, the sentence imposed or the reasons for dealing with the matter in camera; and the Judge ordered that there be no publication of anything other than the fact that a man had been sentenced. The Court of Appeal rescinded the order, and substituted orders suppressing publication of any of the facts before the sentencing judge other than information provided by the Court of Appeal judgment or contained in the Return of Prisoners Tried and Sentenced.

34 J Burrows and U Cheer, *Media Law in New Zealand* (5ed, Oxford University Press, Melbourne, 2005) 331.

35 See the discussion in Chapter 6 as to the scope of the inherent jurisdiction, and the decision in *Paraha and ors v New Zealand Police* (24 April 2008) HC AKL CRI 2007 092 5673, Heath J, para 23.

36 *Broadcasting Corporation v Attorney-General* [1982] 1 NZLR 120, 124.

2.29 In *Curtis v Police*,[37] the appellant applied to suppress all evidence adduced at the preliminary hearing, after which he was committed to the High Court for trial on a charge of murder. The application was dismissed, as was the subsequent appeal. The High Court found that the Judge had made express and specific suppression orders to meet fair trial concerns, leaving an ability to report the balance of evidence in accordance with open justice and freedom of expression.[38]

Q8 Should the courts have the power to make blanket suppression orders?

Q9 If not, is there a need for a statutory prohibition on orders of this nature?

37 *Curtis v Police*, above n 20.

38 Ibid para 23.

Chapter 3

Suppression of name or identifying particulars of accused or convicted persons

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OPEN JUSTICE AND DEPARTING FROM THE PRINCIPLE

3.1 Section 140(1) of the Criminal Justice Act 1985 gives the court a broad discretion to prohibit publication of names or particulars of the accused or any other person connected with the proceedings. The section does not set out any criteria for the exercise of this discretion. In *R v Liddell*, the Court of Appeal declined to lay down any fettering code in this regard, but stressed that the prima facie presumption as to reporting is always in favour of openness,[39] and noted the right of the media to report proceedings fairly and accurately as surrogates of the public.[40] However, the Court of Appeal also noted that departures from this principle are necessary at times to avoid prejudice in pending trials.

3.2 In *Lewis v Wilson & Horton Ltd*, the Court of Appeal confirmed the starting point of open justice, and concluded that the balance must come down clearly in favour of suppression before the prima facie presumption in favour of open reporting can be overcome.[41] In *Abbott v Wallace*,[42] the High Court referred to this formulation, and said it was unwise for judges to put the matter on the basis that suppression orders can only be made for compelling reasons, as that could suggest the adoption of a higher test than set out by the Court of Appeal.

39 *R v Liddell* [1995] 1 NZLR 538, 546 – 547.

40 Ibid, 546.

41 *Lewis v Wilson & Horton* [2000] 3 NZLR 546, para 43.

42 *Abbott v Wallace* [2002] NZAR 95, para 34.

3.3 However, in *Re Victim X*,[43] the Court of Appeal held that "compelling reasons" or "very special circumstances" were required to justify departure from the open justice principle.[44] The onus is on those opposing the application of the principle of open justice to establish those reasons or circumstances.[45]

3.4 It has been suggested that some recent cases in relation to section 140 have subtly altered the application of section 140 in name suppression cases.[46] In *X v New Zealand Police*,[47] Baragwanath J noted the starting point for any application for suppression was open justice, but said it was essential to focus carefully on the specific facts of the case, and the stage at which the application is made. In relation to the exercise of the judgement as to suppression at a pre-trial stage, the Judge noted:[48]

> The factors of importance are first the public interest in openness which is a pointer towards declining the application. But contrary to what was said by the learned Judge, the test for exercise of the jurisdiction under s 140 is not whether "there are exceptional reasons." It is simply whether departure from that starting point is justified on an overall balancing of the relevant factors in accordance with the test of what at this stage the interests of justice require.

3.5 In *GAP v New Zealand Police*,[49] Priestley J agreed that displacing the presumption of openness where suppression is sought before trial is a much less onerous task than when the applicant has been convicted, because of the importance of the right to be presumed innocent until proved guilty according to the law. The Court came to the same conclusion in *Nobilo v New Zealand Police,*[50] although the Judge noted that the presumption of innocence is not enough in itself to justify suppression.

3.6 The suggestion that the presumption of innocence is not always given sufficient attention in pre-trial applications is not a new one.[51] But the formulation of the approach to suppression in these recent cases has been described as an attempt to loosen the strict Court of Appeal tests, and it has been suggested that the abandonment of a high threshold in favour of a vague "overall balancing" test could lead to more name suppression applications being granted.[52]

3.7 In the recent decision of *R v B*,[53] which again involved a question of pre-trial suppression, Baragwanath J described the presumption of innocence and the adverse consequences of publication of what may be an unjustified charge as being among factors to be weighed in making a decision on suppression.

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43 *Re Victim X* [2003] 3 NZLR 220.

44 Ibid, para 37.

45 Ibid, para 45.

46 New Zealand Law Society *Media Law – rapid change, recent developments* April 2008, 15.

47 *X v New Zealand Police* (10 August 2006) HC AKL CRI-2006-404-259, Baragwanath J, para 8.

48 Ibid, para 34. See also *J v Serious Fraud Office* (10 October 2001) HC AKL A126/01, Baragwanath J.

49 *GAP v New Zealand Police* (23 August 2006) HC ROT CRI-2006-463-68, Priestly J.

50 *Nobilo v New Zealand Police* (17 August 2007) HC AKL CRI 2007-404-241, Harrison J, at para 11.

51 See for example *M v Police* (1991) 8 CRNZ 14, where Fisher J stated that the presumption of innocence and the risk of substantial harm to an innocent person should be expressly articulated to avoid the danger that they will be overlooked.

52 NZLS seminar, above n 46, 16.

53 *R v B* [2008] NZCA 130, para 57.

He stated that the presumption of innocence means that if there is significant reason to consider that the defendant may be unfairly prejudiced by a refusal of orders under sections 138 or 140, the onus will pass to the prosecution to show why orders should not be made. He described the process as dynamic; the position may change as the pre-trial processes take place. The principles that apply may differ when the defence is able to present its side – what may be unfair publicity at the first stage may be necessary at the second to permit proper reporting of the trial, and may be fully justified by the verdict that marks the third stage.

3.8 It is clear from this summary of recent cases that, in relation to suppression of the name of a person accused of a crime, there is still a presumption in favour of publication: the exercise undertaken by the courts is not a neutral balancing of factors. However, the theme emerging from the cases is that it will be easier to rebut the presumption of openness at the pre-trial stage than later in the proceeding. This appears to have been justified by reference to the presumption of innocence, which we discuss further below. Once the trial commences, the threshold for suppression is higher: at that stage, compelling reasons will be required for a suppression order. In other words, at trial, open justice principles are likely to dominate others.[54]

Is open justice the appropriate starting point?

3.9 In relation to names and other identifying particulars of accused and convicted persons, the arguments for and against a strong presumption in favour of publication need closer consideration. On the one hand, there are at least four reasons why freedom of expression in this context may be regarded as in the public interest.

3.10 First, if publication of all particulars relating to the identity of the accused were to be suppressed, either permanently or until the time of conviction, this might make it difficult to publish evidence being given during the trial. That would in turn undermine the principles in favour of open justice that underpin section 138.

3.11 Secondly, if names were routinely suppressed, it would, in the words of the Criminal Law Reform Committee of 1972, leave "wide open" the suspicion of underhand conduct of one kind or another:

> If facts are to be suppressed at any stage of the proceedings there must be extremely strong reasons for doing so, and the procedure adopted must be compatible with maintaining full public confidence in the fairness and impartiality of criminal proceedings.

In particular, the provision of the names of defendants may be seen as part of the requirement described in the *Broadcasting Corporation* case of ensuring that the judiciary is seen to grapple in the same even-handed fashion with the whole generality of cases. The provision of names allows the public to see that the same standards apply to the rich as to the poor, to the famous as to the unknown.

54 *X v New Zealand Police* above n 47, para 16.

3.12 Thirdly, the routine suppression of names would sometimes cast undue suspicion on others who might otherwise be implicated by the fact that the offence could in the circumstances have been committed by only a small pool of people in the community.

3.13 Finally, given that there is a high factual probability that those charged with offences are guilty of them, it is in the interests of the community that it knows the identity of those who are charged, so that members of the community can take precautions to reduce the prospects of further offending by those people. Publication also allows the possibility that victims of other offences by the same individual may come forward.

3.14 On the other hand, the argument in favour of suppression of name as a reasonable limit on the right in section 14 of the New Zealand Bill of Rights Act 1990 is simply that to the extent that publicity about the fact that a person has been charged with a crime occurs, it may have a significant impact on their reputation. The effects can range from mild embarrassment to ostracism, and may extend to other people because of their association with the accused, such as spouses, parents, children, and even employers or business partners. As we discuss further below, the potential harm is not merely to the person's reputation but also to his or her personal dignity and mental or physical wellbeing. Moreover, it may not be wholly repaired if the accused is acquitted: the acquittal may receive less publicity than the charge; and an acquittal will not always, or even generally, be regarded as establishing that the accused was innocent.

3.15 There is always the potential for this harm arising, and the hardship that may result from it, when charges are brought against an individual. That harm is undoubtedly increased whenever the charges are publicised. Unlike the risk of unfairness that may arise from publicity in a case falling to be considered under section 138, (where the risks are likely to materialise only in a very small proportion of cases), the harm and resulting hardship arising from publication of name will to a greater or lesser extent affect all cases coming before the court, at least where the person charged does not have a substantial criminal record. The reasons in favour of publication of name (compelling though they are) apply in only a small proportion of cases. For example, in most cases there is nothing about the name of the accused that will allow members of the public to assess whether or not members of the judiciary are acting in an even-handed fashion. Similarly, suppression of name is likely to affect the ability of the media to report the evidence only infrequently.

3.16 Although this might be thought to suggest that there should be a presumption against publication, in our view that would be going too far. In the first place, it is an argument that does not withstand scrutiny following conviction, since the harm is generally both a justified and inevitable corollary of a conviction. Even prior to conviction, the harm to the individual accused caused by publication of name can be overstated. In cases where there is a substantial prior criminal record of offences of the same type as that charged, there may be no real reputation to be damaged by publicity about the current charges. There will often be limited or no publication of a defendant's name prior to, or even after, conviction. Harm resulting from any publication of a charge may also be remedied

by the news that the defendant was acquitted. It is only in a minority of cases that the harm is inherently undesirable and needs to be balanced against the benefits that flow from publication.

3.17 As a result, we are inclined to conclude that the presumption in favour of open justice is just as applicable to the names of accused and convicted persons as to the suppression of evidence. However, the factors that should rebut that presumption are likely to differ, since it is difficult to envisage circumstances where some of the grounds we suggested for suppression of evidence could apply in the case of names of an accused or convicted person. For example, risks to the security or defence of New Zealand, maintenance of the law, and the safety of other persons are unlikely to arise from publication of the name of an accused or convicted person.

Grounds for suppression

3.18 In our view, although the courts have on occasion warned against laying down any fettering code in relation to the discretion to suppress names, there is considerable merit in the idea of setting out the grounds on which name suppression may be granted in legislation. There are three grounds that we think should operate to rebut the presumption of open justice in the context of applications for name suppression, namely the risk of prejudice to a fair trial; undue hardship to the victim; and the overall interests of justice.

Fair trial

3.19 The most obvious reason for suppressing the name of an accused or convicted person is that publication would prejudice the person's right to a fair trial. This is most likely to arise where an accused faces a number of charges that are being tried separately. Publication of the person's name in connection with the first charges dealt with might prejudice the trials of the later charges. The threshold, we suggest, should be the same as that applying to the suppression of evidence.

Undue hardship to the victim

3.20 In cases of incest or sexual conduct with a dependant family member, the objective of protecting the victim means that the name of the offender or any particulars likely to lead to his or her identification must also be suppressed. This objective is given effect by section 139(2) of the Criminal Justice Act 1985. Assuming no order for name suppression is in place under section 140, the court may make an order identifying the offender if the victim is 16 or over and applies for such an order, and the court is satisfied that the victim understands the nature and effect of the decision to apply to the court for the order.[55]

3.21 In our view, these provisions are appropriate. In cases other than those covered by section 139, there may also be situations in which publication of the name of the accused might cause undue hardship to a victim. We have suggested this as a possible test for suppression of evidence. If that is appropriate, it would also seem appropriate as a test for suppression of the name of the accused or convicted person, where publication would identify the victim. As we have already said,

55 Criminal Justice Act 1985, s 139(2A).

section 6 of the New Zealand Bill of Rights Act 1990 would require courts to interpret the term "undue hardship" consistently with section 14 of the New Zealand Bill of Rights Act 1990, and hence with open justice. This would allow the courts to undertake an appropriate balancing exercise between the interests of victims and the principle of open justice.

The interests of justice

3.22 The presumption of publication should also be rebutted where the court is satisfied that a suppression order would be in the interests of justice. A test of this kind enables the court to weigh a whole range of factors that may, either individually or in combination, rebut the presumption of publication. However, as noted earlier, the test is inherently vague. Accordingly, it would be useful to supplement the test with a list of factors to assist in determining what the "interests of justice" require. These factors could be drawn from the factors that the courts have already identified as being relevant to the exercise of the name suppression discretion.

3.23 We regard the following factors identified in the cases as uncontroversial and appropriate for inclusion in any statutory list to assist the courts in applying the phrase "the interests of justice":

(a) The risk of suspicion being cast on others; [56]

(b) The possibility of discovering other offending; [57]

(c) The public interest in knowing the character of the person. An interest of this kind has been acknowledged in cases involving sexual offending, dishonesty and drug use.[58] This is related to the possibility that further offending may be avoided if the person is identified;[59]

(d) Any adverse impact from publication on the prospects for rehabilitation of a person convicted of an offence;[60]

(e) Whether the accused was acquitted or convicted. If a person is acquitted, the court may more readily apply the power to prohibit publication.[61]

3.24 However, there are a number of other potential factors identified in the cases that we consider to be more controversial and require discussion:

(a) Hardship to the accused or others;

(b) No preference to certain classes of people;

(c) Privacy and dignity;

(d) Seriousness of the charge;

(e) Views of the victim;

(f) Futility.

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56 *H v Police* (1989) 4 CRNZ 215.

57 *R v Liddell* above n 39, 546-7; *Proctor v R (also cited as Prockter v R)* [1997] 1 NZLR 295, 301.

58 *Lewis v Wilson & Horton*, above n 41, para 42.

59 *R v Liddell* above n 39, 547; *R v B* above n 53, para 58. The risk of further offending is particularly relevant where it is assisted by anonymity, as with molestation of minors, or where the accused person is qualified to be employed in a position of trust. Even where the likelihood is small, weight should be given to the right of the public to decide whether to expose themselves to the risk – *Proctor v R*, above n 57, 301.

60 *Lewis v Wilson & Horton*, above n 41, para 42.

61 Ibid. However, in *R v Liddell* the Court recognised that the public also has an interest in acquittals.

Hardship to the accused and/or others

3.25 In deciding whether to suppress names and identifying particulars of an accused or a convicted person, the cases show that the courts may take into account hardship to that person, his or her family, or those who work with him or her. Such hardship may take the form of distress, embarrassment, and/or adverse personal and financial consequences. Ordinary hardship is not enough: some damage out of the ordinary and disproportionate to the public interest in open justice in the particular case is required to displace the presumption in favour of reporting.[62] In a recent case, the Court stated that the impact on an offender's physical and mental health and chances of rehabilitation must be exceptional to displace the presumption.[63]

3.26 The cases indicate that the personal circumstances of the accused or their family may carry different weight at different stages of the trial. It is very rare that the interests of an offender's family will justify suppression after conviction if the offending is serious.[64] In cases involving sexual offending, embarrassment to the family can be expected and is not enough by itself to justify suppression.[65]

3.27 The courts have not considered an offender's community standing to be relevant in the absence of "special harm" through publicity.[66] Undue media interest by itself is not special harm.[67] There is no special protection for prominent people. In *Proctor v R*,[68] a surgeon who argued that publicity would destroy his professional practice was refused name suppression. The Court referred to the need to avoid creating a special echelon of privileged persons in the community who will enjoy suppression where their less fortunate compatriots would not.

3.28 Not all jurisdictions include hardship to the accused as a ground for name suppression. In Australia, at common law, the bases for derogation from open justice are limited, with hardship to parties or witnesses not being recognised as a ground for suppression.[69] In South Australia, before 1989, publication could be suppressed to prevent undue hardship to any person, including the accused in a criminal case. That was subsequently amended to limit the application of hardship to children, alleged victims, or witnesses who are not parties.[70] Hardship to the accused is not one of the statutory grounds in Victoria, or New South Wales.

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62 Ibid.

63 *Beardsley v Police* [2008] DCR 603, para 14. The Court cited the case of *Lutomski and Mackiewicz v Accident Compensation Corporation* (2 July 2002) HC WN AP 119/02 Hammond J, where there was evidence of a high risk that the two offenders (who were convicted of fraud) would commit suicide should name suppression be lifted. Hammond J nevertheless declined to grant final name suppression, because the risk was not clearly substantiated: open justice was so important that it should prevail.

64 *R v Liddell* above n 39, 548.

65 *Prentice v Police* (13 November 2007) HC WN CRI-2007-485-90 MacKenzie J.

66 *Lewis v Wilson & Horton Ltd* above n 41, para 68.

67 Ibid.

68 *Proctor v R* , above n 57.

69 Andrew T Kenyon *Not Seeing Justice Done: Suppression Orders in Australian Law and Practice* (2006) 27 Adelaide Law Review 279, 290.

70 Ibid.

3.29 In our view, hardship to the accused, or his or her family members, or those who work with him or her, should be included as a statutory factor to assist the courts in determining what the interests of justice require in cases of name suppression. There are two situations in which we consider that this factor would be most likely to arise. First, it would allow the courts to accommodate those situations in which publication of an accused's name before conviction would cause irreparable harm to the accused's reputation outweighing the public interest in publication. Secondly, it would enable name suppression in situations where the accused has been convicted, but the court is satisfied that the consequences of publication of name would be out of all proportion to the gravity of the offence.[71]

3.30 What degree of hardship should be required? We consider that ordinary hardship has been rightly rejected by the courts as being too low a threshold. Two higher tiers of hardship are identified in New Zealand legislation relating to other criminal offences.

3.31 The first is *undue* hardship, which has been described by the courts as serious hardship,[72] or excessive or greater hardship than the circumstances warrant.[73] Examples of the use of "undue hardship" in the legislation include:

- Where a person is convicted of a serious offence, section 15 of the Proceeds of Crime Act 1991 allows the court to order that tainted property (property used to commit or help to commit the offence, or which constitutes the proceeds of the offence) should be forfeited to the Crown. The court must consider whether the operation of the order is reasonably likely to cause any undue hardship to any person;
- If a court is lawfully entitled under Part 2 of the Sentencing Act 2002 to impose a sentence of reparation, it must impose it unless it is satisfied that the sentence would result in undue hardship for the offender or the dependants of the offender, or that any other special circumstances would make it inappropriate;[74]
- Section 128 of the Sentencing Act 2002 provides the court with a power to make orders for confiscation of a motor vehicle where certain offences have been committed under the Land Transport Act 1998, or where the car was used to commit an offence or to help the offender escape. In deciding whether to make an order under the section, the court must have regard to any undue hardship that the order would cause to the offender in relation to his or her trade, business, profession, occupation, or employment; or to any other person who would have the use or benefit of the car on a regular basis.

3.32 A higher threshold would be to require *extreme* hardship. For example, this test appears in two provisions, which also distinguish between requiring extreme hardship to the accused, or undue hardship to any other person:

71 We note this is the ground codified in section 107 of the Sentencing Act 2002 upon which a discharge without conviction may be granted under section 106 of that Act. It seems appropriate that a similar principle should apply in cases of name suppression. That is not to suggest however that names will necessarily be suppressed where a discharge without conviction is granted.

72 *R v Wallace* (2001) 18 CRNZ 577 (CA), in the context of the Proceeds of Crimes Act 1991.

73 *Dalton v Auckland City* [1971] NZLR 548, at 549 – 50, in the context of section 35A of the Transport Act 1962.

74 Sentencing Act 2002, s 12.

- In the context of the court's power under section 129 of the Sentencing Act 2002 to order the confiscation of a motor vehicle after a second offence against certain provisions of the Land Transport Act 1998 within four years of the commission of a first offence, extreme hardship to the offender will preclude the making of the order, as will undue hardship to any other person.
- The court is entitled to make an order authorising a grant of a limited licence to a disqualified driver, if it is satisfied that the disqualification or suspension results in extreme hardship to the applicant, or undue hardship to others.[75]

3.33 The extreme hardship threshold requires a very high level of hardship. The courts have indicated that the determination of what amounts to "extreme hardship" must be made in a common-sense way, and in relation to the facts of a particular case. It is an objective test, not based on how the particular offender may perceive the extent of the hardship. To amount to extreme hardship, the hardship must be such that in the particular circumstances it is excessive, even when viewed in relation to the context of the concerns underlying the legislation (such as preventing repeat offenders having access to vehicles, and preventing accidents and injuries on the roads).[76]

3.34 In our view, the threshold of extreme hardship is too high in the context of suppression of name of a person accused or convicted of a crime. It might not, for example, take account of situations where the consequences of publication are out of all proportion to the gravity of the offending. We consider that a test of undue hardship is more appropriate. A determination of whether there was undue hardship should be made taking into account all the relevant factors in the case, including the stage of the trial, and the public interest. After conviction, the court will no longer need to consider the question of whether the defendant might suffer irreparable harm to reputation that cannot be undone in the event of an acquittal, and the circumstances that would result in name suppression after a conviction for a serious offence will accordingly be rare.

No preference to certain classes of people

3.35 The courts have been careful to emphasise that there is no special echelon of favoured persons when applications are made for name suppression: the law applies equally to all men and women.[77]

3.36 In *Nobilo v New Zealand Police*,[78] the High Court was faced with a case in which the publication of the applicant's name would have a greater impact on her than if her family name was not well known. The Court considered whether that factor should of itself be decisive, and concluded that if it was, it would create a principle that those whose names are of particular interest to the media should have pre-trial suppression but those who are unknown should not enjoy the same benefit. Harrison J concluded that such a distinction could not be right in principle or justice.[79]

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75 Land Transport Act 1998, s 105.

76 *Police v Rihari* (23 July 1998) HC WHA AP10/98, Laurenson J, 7; *McFarlane-Nathan v Police* (9 July 2008) HC WHA CRI-2008-488-7, Allan J, para 14.

77 *Proctor v R,* above n 57, 300; *W v Police* [1997] 2 NZLR 17, 20.

78 *Nobilo v New Zealand Police*, above n 50, para 16.

79 Ibid, para 17.

3.37 In preliminary consultation, some members of the media expressed a strong view that suppression orders are granted more readily to people who are well known than to people without a public profile. The fact is, however, that publicity is not applied on an equal basis: a greater amount of media attention is always likely to be given to cases involving people with a high public profile. Thus questions of hardship to the accused or a family member resulting from publicity may arise more often in the context of a well known person in part because there will be much more publicity about the charges against them. It is difficult to avoid the conclusion that, if undue hardship is a relevant factor, the person's status and reputation and the publicity that may result from that is relevant to a determination of whether such hardship is likely to arise.

Privacy and dignity

3.38 In *X v New Zealand Police*[80] and *R v B*,[81] Baragwanath J referred to the right to human dignity and privacy as factors overlapping with the presumption of innocence which should be taken into account in applications for suppression. Baragwanath J referred to human dignity as being increasingly protected by the evolving right to privacy, which he described as likely to be the "major interest to be weighed in favour of suppression".[82]

3.39 The reference to privacy as a factor raises the vexed question of what privacy is. The parameters of privacy are uncertain. It is closely related to and overlaps with other concepts, including reputation, which concerns a person's standing in the eyes of others. But privacy also overlaps with, and is sometimes confused with, other concepts, such as secrecy, confidentiality and property.[83] It can be described as protection against unwanted access by other people, where a person has a reasonable expectation of being able to control such access.[84] It may be described in terms of harms to privacy.[85]

3.40 Whatever meaning is ascribed to the concept of privacy, it is difficult to see its application in this context. How can the accused have any privacy rights in respect of the charge brought against him or her, given that the charge is essentially an allegation of a public wrong? It seems inherently contradictory to suggest that privacy of the accused could displace the presumption of publication of the accused's name if the whole point is to conduct a public trial of the accused.

3.41 In cases in which privacy is described as a factor to be taken into account, it is often being used to describe other underlying interests which may require protection, such as reputation, or mental or physical well-being, or the harm which may occur to an individual if open justice prevails. In our view it is not necessary to describe these as "privacy interests" in order to protect them. They may be taken into account in considering the question of hardship to the accused.

80 *X v New Zealand Police,* above n 54.

81 Above n 53, para 43.

82 *X v New Zealand Police,* above n 54, para 12.

83 New Zealand Law Commission *Privacy: Concepts and Issues* (NZLC Study Paper 19, Wellington, 2008) pp 48 – 51.

84 Ibid, para 3.12.

85 Daniel J Solove "A Taxonomy of Privacy" (2006) 154 U Pa L Rev 477, 522.

Seriousness of the charge

3.42 The seriousness of the charge has been described as a relevant factor.[86] Where a person is convicted of a serious crime, name suppression will only be ordered in rare cases. Where the charge is truly trivial, particular damage caused by publicity may outweigh any real public interest.[87]

3.43 Does the seriousness of the charge operate differently before conviction? At the pre-trial stage, a more serious charge may carry with it a greater risk of damage to reputation and resulting hardship, in respect of an offence of which the accused may be acquitted. This might suggest that the seriousness of the charge weighs against openness at the pre-trial stage. On the other hand, if the charge is sufficiently serious, there may be a public interest in favour of openness, to avoid the risk of suspicion being cast on others, or to encourage other victims to come forward, or in the case of some offences, such as sexual offending, to avoid a risk of further offending. Conversely, there may be less risk of damage to reputation from a trivial charge being publicised pre-trial, which may be seen to weigh against suppression.

Views of the victim

3.44 Where an offender applies for an order for permanent name suppression, the court must take into account any views of a victim of the offence, or of a parent or legal guardian of a victim of the offence, conveyed in accordance with section 28 of the Victims' Rights Act 2002.[88] It is the prosecutor's responsibility to ascertain these views and put them before the court.[89] The complainant's attitude, whether in favour of or against suppression, is not decisive. [90]

3.45 The question of why victims' views on name suppression should be sought and what weight should be given to them raises similar issues as arise in the context of consideration of the victim's role in the sentencing process. When an offender is sentenced, the court must take into account any information provided about the effect of the offending on the victim.[91] However, the views of the victim as to sentence are generally accorded little, if any, weight. This reflects the underlying principle that sentencing decisions are to be made in the public interest and not according to the private interests and wishes of victims.

3.46 Similarly in the suppression context, it seems entirely appropriate for the court to be apprised of any impact that the publication or non-publication of an offender's name may have on the victim and/or his or her family and for this to be taken into account in suppression decisions. What is less clear is whether the wishes of the victim (whether they are punitive or lenient) should be taken into

86 *Lewis v Wilson & Horton*, above n 41, para 42.

87 *R v Liddell*, above n 39, 547.

88 Criminal Justice Act 1985, 140(4A).

89 Victims' Rights Act 2002, s 28.

90 *R v Kealey* (2001) 18 CRNZ 602, para 13: "If they are opposed to suppression, that opposition will be an important consideration in determining that the presumption of open justice should prevail. If they support suppression for reasons relating to their own protection or the protection of their family, that too must weigh with the Court, but it may still not suffice to offset the public interest in publication of the offender's name."

91 Sentencing Act 2002, s8(f).

account. Why should the presumption in favour of openness be stronger because of the wishes of the victim? It seems wrong in principle that the presumption may be weakened because the victim is forgiving, so why should the opposite apply?

Futility

3.47 Generally, where information as to the identity of someone appearing before a court is already in the public domain, it will not be appropriate to grant name suppression.[92] The law will not undertake an exercise in futility, which would bring its own authority and processes into disrepute. In *Tucker v News Media Ownership Ltd*,[93] McGechan J noted that justice certainly should appear blind, but should not appear stupid.

3.48 However, in *Re X*,[94] Wellington Newspapers Ltd applied to set aside an order for suppression of the name of a victim, and included as one of the grounds the fact that the name of the victim had been published on an overseas website, and thus the information was already in the public domain. The Court did not accept that the force of the existing suppression order would have been spent, noting:[95]

(a) Not every person will have access to the Internet, or be capable of accessing this material. The court should continue to afford such protection from harm to the victim as it can employ, and even a reduction of the extent of the harm is a consideration which should attract real weight.

(b) The integrity of the process and orders of the court must be protected. It would be quite wrong if the information could be placed on the Internet overseas, and this was then used as a device to avoid or have set aside an order for suppression which had been properly made in New Zealand.

(c) The law should not allow technology to become determinative, and to break down rules which Parliament has put in place for the protection of victims.

3.49 How should the courts deal with futility? At one level there seems little purpose to be served by a suppression order where a person's name has already been published. On the other hand it would be undesirable if suppression orders could be subverted by breaches of a non-publication order or by publication on an overseas website. The answer may depend on how widespread the publication has been, how accessible the publication is and whether the publicity can be considered as spent. We discuss the particular issues that arise with the Internet in Chapter 8.

3.50 It is not just publication on the Internet that can result in suppressed names or evidence being circulated: gossip spread rapidly well before the days of the Internet. This issue arises particularly in relation to the suppression of names of well-known people, as the more well-known the accused, the greater the likelihood that the name will leak out despite a suppression order being in place. However, just because a number of people may find out who the accused is does

92 *Lewis v Wilson & Horton Ltd*, above n 41 para 94, per Elias CJ.

93 *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 at 736.

94 *Re X* [2002] NZAR 938, per Hammond J.

95 Ibid, paras 23 – 27.

not mean that every one should be able to, if there are valid reasons for imposing a suppression order in the first place. While they may not prevent the spread of knowledge, suppression orders always have some effect in limiting it.

Exhaustive or non-exhaustive list

3.51 A statutory list of criteria could be framed as either exclusive or non-exhaustive. In considering the factors to be taken into account in name suppression decisions, the courts have indicated that the list is not closed.[96] Given the current broad discretion, and the range of circumstances that come before the courts, a non-exhaustive approach may be preferable.

Q10 Do you agree that the presumption of open justice should apply to suppression of the names of accused and convicted persons?

Q11 Do you agree that:

(a) protection of the right to a fair trial;

(b) undue hardship to victims; and

(c) the interests of justice;

are appropriate grounds for suppression of the names of accused and convicted persons? Why/why not? Are there any other grounds that should be considered?

Q12 Should there be a statutory list of factors to assist in determining what the interests of justice require?

Q13 (a) Should hardship to the accused be a factor to be taken into account in name suppression applications?

(b) If so, what level of hardship should be required?

(c) Is a different threshold appropriate for people such as family members of the accused?

Q14 (a) Should the fact that name suppression may have a greater impact on well known people affect suppression decisions? If so, why?

(b) Should it be listed as a separate statutory factor, and if so in what way?

Q15 Should privacy be a factor to be taken into account in applications for name suppression? If so, what does privacy mean in this context?

96 *R v Liddell*, above n 39, 548.

Q16 (a) Should the seriousness of the offending be a factor to be taken into account in applications for interim name suppression?

(b) If so, how should it operate before and after trial?

Q17 (a) For what purposes should the views of the victim be taken into account as a factor in name suppression applications?

(b) What weight should attach to those views?

Q18 (a) Should futility be a reason for declining suppression orders?

(b) Are there circumstances where suppression orders should be made despite an earlier publication? If so, what are they?

Q19 If there is a statutory list of factors to be considered in name suppression cases, should it be exclusive, or non-exhaustive?

Q20 Are there other factors which should be included in a list of statutory criteria?

Should there be different tests for suppression before trial?

3.52 Earlier in this chapter, we noted a number of cases which describe the presumption of innocence as a factor that may make it easier to displace the principle of open justice at the pre-trial stage. Some commentators would go further and suggest that the presumption of openness should not apply at the pre-trial stage.

3.53 In 1972, the New Zealand Criminal Law Reform Committee recommended that further provision should be made for the protection of accused persons by restricting the publication of particulars before the case is gone into: in other words, in a summary proceeding, before the time at which the prosecution presents its case or the accused pleads guilty; or before the taking of depositions at a preliminary hearing where the accused is to be tried by jury.[97]

3.54 The recommendations of the Criminal Law Reform Committee were not implemented. In 1975, however, there was a short-lived amendment to the Criminal Justice Act 1954 that overturned the presumption of openness at the pre-trial stage.[98] The new section 45B provided that unless the court ordered otherwise, there was to be no publication of the names or identifying particulars

97 Criminal Law Reform Committee *The suppression of publication of name of accused* (Report 5, Government Printer, Wellington, 1972), para 9.

98 Criminal Justice Act 1954, s45B.

of an accused, unless and until that person was found guilty and a conviction was entered by the court. This section was only in force from September 1975 until July 1976.[99]

3.55 In 2004, the Law Commission expressed concern that since the decision in *Proctor v R*,[100] the law relating to pre-trial suppression of an accused's name did not appear to have given sufficient recognition to the presumption of innocence. The Commission considered that the earlier proposals of the Criminal Law Reform Committee offered an approach to the issue that should be reconsidered.[101] The Commission recommended that after a person is charged, there should be a general presumption that publication of their name or identifying particulars should be prohibited until the substance of the case is gone into by the court. Exceptions should be made in certain circumstances.[102] The Government did not accept this recommendation.[103]

3.56 However, the Commission has reconsidered its earlier position. It now takes the view that the presumption of innocence is not relevant to name suppression decisions. The presumption of innocence is a rule about how trials are run. In effect, it is shorthand for the legal protections that apply to accused persons within the justice system, including the right to silence and the right to have charges proved beyond a reasonable doubt. It does not imply that for all purposes the accused is to be treated as factually innocent of the charge. If that were the case, few accused would be remanded in custody pending trial.

3.57 Moreover, the fact that a charge has been laid does not carry with it any legal implication that an accused person is guilty. It follows that publishing the fact of a legal charge could not offend the presumption of innocence in any case. Indeed if the media were to suggest that a person who had been charged, but not convicted of an offence, was guilty, they would be liable for contempt, and risk defamation proceedings in the event of an eventual acquittal.

3.58 The real question is whether the risk of harm to reputation or dignity that a person may suffer when it becomes known that he or she has been charged with an offence warrants a different approach to pre-trial name suppression.

3.59 We acknowledge that in some cases the publication of the name of a defendant can have a serious adverse effect on an accused, particularly in small communities. It is also true that an acquittal may not be as widely published as the original offending or may be seen as an accused "getting off" on a technicality. In other cases, of course, there is little or no risk of damage to an accused's reputation, particularly if he or she has a lengthy previous criminal history.

99 Section 45B was repealed by the Criminal Justice Amendment Act 1976, s 2.

100 *Proctor v R* above n 57.

101 New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85), Wellington, 2004, 316.

102 Ibid, Recommendation 156.

103 Ministry of Justice *Government Response to Law Commission Report on Delivering Justice for All* Wellington, 2004, paras 21, 22, 297.

3.60 Do the possible risks to reputation require a different approach to name suppression at the pre-trial stage? Our tentative view is that they do not. As we have already outlined, hardship to an offender may displace the presumption of open justice. Depending on the circumstances, this could include the hardship caused by the potential for irreparable damage to reputation at the pre-trial stage. However, if it is considered that the hardship ground provides insufficient protection to persons whose reputations could be irreparably damaged by pre-trial publicity, it would seem a preferable approach to list such damage as a factor to be taken into account, rather than reversing the presumption of openness at the pre-trial stage. As we have already noted, there are sound reasons for the presumption of openness even at the pre-trial stage and in the vast majority of cases publication of an accused's name has little impact on reputation.

3.61 In South Australia, a different approach has been adopted to the issue of protecting reputation. A newspaper or radio or television station that publishes a report of proceedings against a person for a criminal offence before the result is known, and which identifies that person, must publish a fair and accurate report of the result of the proceedings if the accused is ultimately acquitted. The report must be published as soon as practicable after the determination of the proceedings, and must be reasonably prominent, having regard to the prominence of the earlier report.[104]

Q21 (a) Should there be greater protection given at the pre-trial stage to protect the reputations of people who have been charged with offences?

(b) If so, should open justice remain the starting point, with impact on reputation being a factor to be taken into account in pre-trial suppression decisions? Is the hardship factor adequate to deal with this, or should there be a specific factor relating to the risk of irreparable damage to reputation?

(c) Alternatively, should the names of the persons charged be suppressed pre-trial with power to publish if required in the public interest?

(d) Is there any merit in the South Australian requirement of equal publicity to acquittal?

104 Evidence Act 1929 (SA) s 71B(1).

Chapter 4

Suppression of names or identifying particulars of victims, witnesses and others

NAMES OF VICTIMS

4.1 At present, with two exceptions, the principle of open justice applies to the names of crime victims.[105] The exceptions appear in sections 139 and section 139A of the Criminal Justice Act 1985.

Victims of sexual offences

4.2 Section 139 operates to protect people who are the victims of the sexual crimes set out in sections 128 to 142A and 144A of the Crimes Act 1961.[106] Where those offences are involved, no publication can be made of the victim's name, or of any name or particulars likely to lead to the identification of that person. However, the court may make an order permitting publication if the victim of the offence is 16 or older,[107] and must make such an order if the victim, being 16 or older, applies to the court to that effect, and the court is satisfied that he or she understands the nature and effect of that decision.[108]

105 Where circumstances exist to rebut the presumption, the court could exercise its discretion to prohibit the publication of the name, address or occupation of a victim under section 140(1), which allows it to make suppression orders in relation to any person connected with the proceeding.

106 Those offences are sexual violation (s 128B), attempted sexual violation and assault with intent to commit sexual violation (s 129); sexual conduct with consent induced by certain threats (s 129A), incest (s 130), sexual conduct with a dependent family member (s 131), meeting young person under s16 following sexual grooming (s 131B), sexual conduct with child under 12 (s 132), sexual conduct with young person under 16 (s 134), indecent assault (s 135), sexual exploitation of person with significant impairment (s 138), and sexual conduct with children or young people outside New Zealand (s 144A).

107 Criminal Justice Act 1985, s 139(1)(a) and (b).

108 Ibid, s 139((1A).

4.3 The exclusive focus of section 139 is on the victim,[109] and the prohibition arises by operation of the statute, and without the need for a court order. There is no balancing the public interest in the open reporting of court proceedings against the prospect or risk of harm to the victim: the statute assumes that any identification of an under-16 year old victim is an unacceptable risk to the welfare of the victim. As to the meaning of the word "likely" in the context of section 139, the courts have found that it is enough if there is an appreciable risk that publication of the material could lead to the identification of the victim.[110]

4.4 It is not absolutely clear from the legislation whether there is any time limit on when a victim may make a request for publication under section 139(1A). There is nothing on the face of the statute to suggest that the request must be made at the time of the trial. There have been situations in which victims whose names have been suppressed have subsequently applied successfully to have suppression of their names lifted,[111] and in our view, it is appropriate that there be a power to do so.

4.5 In the case of other suppression orders, there comes a point where the proceedings have come to an end, judgment has been entered or a decision given, and the court is *functus officio* as far as that case is concerned – it cannot vary the judgment it has given.[112] There is authority that a District Court judge cannot make a suppression order after that time, nor vary nor revoke one already made, unless it has statutory authority to do so.[113] It seems likely that section 139 was intended to remove this difficulty, and certainly in *Chan v Attorney-General*,[114] the High Court considered that it had the power to do so, and made an order permitting publication of the victim's name six years after the crimes took place.[115] In our view, the legislation should be amended to remove any doubt about the power of the courts to grant orders on the application of a victim allowing their identification at any time after a trial.

Children

4.6 Section 139A prohibits the publication of the name or identifying particulars of any person under the age of 17 who is called as a witness in any criminal proceedings. The result is that if a child victim of an offence is called to give evidence in the resulting proceedings, his or her identity will be protected.

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109 *R v W* [1998] 1 NZLR 35 (CA), 40.

110 Ibid.

111 For example, in *Chan v Attorney-General* [2005] NZAR 135, the applicant was the victim of a vicious rape. Six years later she wished to enter public debate surrounding a Government proposal to allow victims to recover damages from offenders, and applied for an order lifting suppression orders imposed for her benefit under s 375A Crimes Act 1961, and seeking publication of her name under section 139 of the Criminal Justice Act 1985.

112 Burrows and Cheer, *Media Law in New Zealand* (5ed, Oxford University Press, Melbourne, 2005) 348, citing *R v Nakhla* (No. 2) [1974] 1 NZLR 453; *Butterfield v R* [1997] 3 NZLR 760. The authors note that the inherent jurisdiction of the High Court probably extends further.

113 Burrows and Cheer, ibid; *Wilson & Horton Ltd v District Court at Otahuhu* [2000] DCR 265.

114 *Chan v Attorney-General*, above n 111.

115 It may also be significant in this regard that in section 139 cases, the suppression arises results from the statutory provision, rather than a court order – Burrows and Cheer, above n 112, 335.

However, if the child is not called as a witness (for example because he or she is too young to give evidence, or because the offender enters a guilty plea), the child's identity cannot be protected under this provision.

4.7 In our view, the prohibition on publication of the identity of a child witness is appropriate. It is anomalous that the same protection does not extend automatically to all child victims, whether they give evidence in the proceedings or not. We suggest that the automatic name suppression provisions should be extended to include victims who are under the age of 17 at the time of the proceedings.

4.8 Unlike section 139, section 139A does not contain a power to permit publication if the child applies to the court to that effect. A 16 year old child victim of a sexual offence would be entitled to apply under section 139 for publication of their name,[116] but if the same child was the victim of another kind of assault and was called to give evidence, he or she could not apply for publication. Similarly a child who was under 16 at the time of the sexual offending can apply for publication of their name under section 139 when they are older, but a child who is the victim of another kind of offending and is called to give evidence cannot, even once they are over 17.

4.9 In our view, a witness who was a child at the time of the criminal proceedings in question should be able to subsequently apply to the court for an order allowing publication of their name and identifying particulars. If the prohibition exists solely for the protection of the child, he or she should be entitled to apply to have that protection removed later.

Other victims

4.10 Apart from these provisions for automatic protection, in other criminal cases the principle of open justice currently applies to the question of publication of the name of the victim. In *Re Victim X* the Court held that there must be compelling or very special reasons for suppressing the name of a crime victim.[117] However, the arguments for and against publishing victims' names require further examination.

4.11 There are fewer arguments for publication of the names and identifying details of victims than of an accused. This is because suppression of victims' names does not raise the same issues as arise in the context of suppression of names of the accused – the possibility of suspicion falling on others, issues of public safety, or the possibility of other victims coming forward. The main argument would appear to be what Lord Widgery CJ described as the 'discipline' that openness imposes on participants in the process to be careful about what they say.[118]

116 In *Waikato & King Country Press Ltd v R* [1997] DCR 292, 297 – 8, the Court noted the statutory inconsistency between section 139(1) and section 139A, which could mean that there was an absolute prohibition under section 139A on publishing the name of a 16 year old victim of sexual offending who gave evidence at the trial. The Court resolved the issue by reading down section 139A to ensure that the purpose of section 139(1) was not lost, and held that a witness under section 139A(1) could not include a complainant or victim covered by section 139.

117 *Re Victim X* (2002) 20 CRNZ 194.

118 *R v The Socialist Worker Printers and Publishers Ltd (ex parte Attorney-General)* [1975] QB 637, 651 – 2.

The fact that suppressing identity may sometimes make it difficult to publish evidence during the trial also provides a fairly limited justification for open justice principles.

4.12 On the other hand, the argument in favour of suppression of names of victims as a reasonable limit on section 14 of the New Zealand Bill of Rights Act 1990 is the impact that publication can have on victims. There are a wide range of possible impacts on victims from publicity. These include shame, humiliation, embarrassment, possible risks to safety and effects on family and business.

4.13 A submission received in the context of the Law Commission's privacy project raises concerns about the publication of victims' names in local media: [119]

- Victims may be deterred from coming forward because of fears of their names being published.
- Victims, particularly victims of domestic violence, may feel shame and humiliation that is exacerbated by publication of their names.
- Victims fear making suppression applications because the mere fact of a suppression application may create further publicity about the case.
- There is no legitimate public interest in widespread publication of victims' personal details.

These concerns might be raised as arguments to support automatic suppression of the names of all crime victims, or at least automatic suppression in a broader category of cases.

4.14 The rationale for the current provision for automatic suppression in sexual offence cases, unless the victim requests publication or the court orders it, appears to be that sexual offences are a special category because of their highly personal, embarrassing and sensitive nature. There are also real concerns about the low reporting rates for sexual crimes because of the ordeal associated with the trial process. Publication of victims' names would provide a further disincentive to reporting. The special nature of these crimes means that the harm to the victim from publication of his or her name will generally rebut the presumption of open justice. On that basis automatic name suppression, subject to the power of the court to order publication should the circumstances so require, seems appropriate.

4.15 However, if the sensitive nature of charges and their potential for embarrassment is the reason for the automatic suppression rule, a question inevitably arises as to whether there are other categories of case where the presumption of open justice should be reversed. Reversal of the presumption of open justice would seem appropriate if the level of sensitivity and embarrassment caused to the victim by publication would rebut the presumption of openness in the majority of cases. Cases involving domestic violence are a possible example. Most domestic violence victims experience shame, humiliation and fear of public disclosure. Victims may well be deterred from reporting domestic violence by the fear of publicity. Equally, embarrassment may feature in other offences committed by family members.

119 Submission from the Dunedin Community Law Centre, undated.

4.16 There are many other categories of crime, such as burglary and theft, where the issues are less sensitive and embarrassment is unlikely to be a major factor. However, publication of victims' names can in some circumstances cause other forms of hardship. In an extreme case it could endanger the safety of the victim. It may also have an impact on victims' daily lives, business interests and families.[120] We suggest that open justice should remain the starting point in these less sensitive cases, but with the ability to rebut the presumption where the circumstances so require. The following three possible grounds for suppression seem appropriate in the context of victims' names:

- that publication would endanger the safety of any person;
- that publication would result in undue hardship to the victim;
- that for any other reason publication would not be in the interests of justice.

In relation to this last ground, we do not consider that the interests of justice in this context require a list of factors in support. It seems likely that most situations will be covered by the first two grounds: the interests of justice are included as a catch-all, to cater for any unforeseen circumstances.

4.17 In our view, the inclusion of these grounds would arguably give victims greater protection than they have under the current law. We seek views as to whether this is appropriate.

Q22 Is the current automatic suppression provision in section 139 of the Criminal Justice Act 1985 justified?

Q23 Should section 139 be amended to make it clear that a victim can apply for disclosure of their name at any time, including after a trial is completed?

Q24 Should the automatic name suppression provisions be extended to further categories of crime victim, such as victims of domestic violence, or victims under the age of 17? If so, what categories and why?

Q25 Alternatively, should there be automatic name suppression for all crime victims subject to the power of the court to order publication?

Q26 Is open justice the appropriate starting point for publication of victims' names in some or all cases?

120 See for example *Re Victim X*, above n 117.

Q27 Do you agree the presumption of open justice should be rebutted if publication of the name of the victim:

(a) would endanger the safety of any person;

(b) would result in undue hardship to the victim;

(c) for any other reason would not be in the interests of justice?

WITNESSES

4.18 As noted above, section 139A of the Criminal Justice Act 1985 provides an automatic prohibition on the names and identifying particulars of children under the age of 17 who are called as witnesses in criminal proceedings. We consider that this is an appropriate prohibition, consistent with the approach of the law to the protection of children and young people in other parts of the justice system, but we note that the question arises as to whether child witnesses should be entitled to apply to the court once they are over the age of 17 to have the prohibition on publication lifted. We see no reason for precluding this.

4.19 Other powers to prohibit publication of the details of witnesses appear in sections 138 and 140 of the Criminal Justice Act 1985. There are differences between the ways the powers are worded. If the suppression order is made under section 138(2)(b), it will be an offence simply to publish the name of the witness. If the order is made under section 140, publication of the witness's name must be in a report or account relating to the proceedings before it amounts to an offence. The grounds for suppression under section 138 are more restricted than the open discretion in section 140. However, in reality, judges seldom specify the section under which they are making an order for suppression.

4.20 The arguments for publication of the names of witnesses are similar to the arguments for publication of the names of victims, although their weight differs. Publication of witnesses' names is compatible with maintaining full public confidence in the fairness and impartiality of criminal proceedings. Openness provides the same "discipline" for witnesses as it does for crime victims to be careful about their evidence. Unlike victims, publication of witnesses' names rarely has any adverse impact on a witness. On that basis open justice is clearly the appropriate starting point. Nevertheless there are cases where publication of a witness's name could endanger his or her safety. There are also cases where publication of a witness's name could cause difficulty or hardship. For example, it might identify the witness as being at a particular place at a particular time which might cause personal difficulty for the witness.

4.21 On that basis we suggest the same tests should apply to witnesses as applies to victims, other than those in the automatic suppression category, namely:

(a) that publication would endanger the safety of any person;

(b) that publication would cause undue hardship to the victim or the witness;

(c) that for any other reason publication would not be in the interests of justice.

4.22 Besides section 139A, there are other statutory exceptions to the open justice rule in the case of witnesses. Sections 110 to 119 of the Evidence Act 2006 provide for anonymity orders to be made in respect of witnesses in certain situations, and sections 108 and 109 operate to protect the identity of witnesses who are undercover police officers. Section 13A of the New Zealand Security

Intelligence Service Act 1969 makes it an offence to publish or broadcast the fact that a person is a member of, or is connected with, the Security Intelligence Services, without the consent of the Minister. In our view, these limits on open justice and freedom of expression are justified.

Q28 Is the current automatic suppression provision in section 139A of the Criminal Justice Act 1985 justified?

Q29 Should child witnesses be entitled to apply for disclosure of their name when they reach the age of 17?

Q30 Do you agree that open justice is the appropriate starting point in the case of witnesses' names? If so, what grounds should rebut the presumption?

Q31 Do you agree that appropriate grounds include:

(a) that publication would endanger the safety of any person;

(b) that publication would involve undue hardship to the victim or witness;

(c) that for any other reason publication would not be in the interests of justice?

Q32 Are the protections contained in the following provisions in relation to suppression of the names of witnesses appropriate:

(a) anonymity orders under the Evidence Act 2006;

(b) sections 108 and 109 of the Evidence Act 2006, relating to undercover police officers;

(c) section13A of the New Zealand Security Intelligence Service Act 1969?

NAMES OF "PERSONS CONNECTED WITH THE PROCEEDINGS"

4.23 Section 140(1) of the Criminal Justice Act 1985 provides that a court may make an order prohibiting the publication of the name, address or occupation of "any other person connected with the proceedings". In *R v Liddell*,[121] the Court considered that the wife and sons of the accused (who had been convicted of sexual offences) were persons "connected with the proceedings", and prohibited the publication of their names, address or occupations, even though the name of the accused was not suppressed.

121 *R v Liddell* [1995] 1 NZLR 538 (CA).

4.24 This approach has been taken in other cases since *Liddell*.[122] However, in the recent decision in *R v Shapiro*,[123] the Court of Appeal did not accept that the jurisdiction under section 140 extends to prohibition of publication of the name of an entity which is not connected with the proceedings but only with the accused, describing the information as being of a collateral nature and unrelated to the criminal proceedings.[124]

4.25 Shapiro was charged with three offences under the Arms Act 1983. He pleaded not guilty, and applied for an order suppressing publication of his name and the name of his employer. On appeal he abandoned the appeal for himself, but still sought suppression of his employer's identity. The Court of Appeal held that the accused's employer was not "connected with" the criminal proceedings against him by virtue solely of its status as his employer:[125]

> That is not a relationship of connection with the proceedings sufficient to fall within the purview of a discretionary power that has the effect of imposing a limitation on the entrenched right of freedom of speech: s 14 New Zealand Bill of Rights Act 1990.

4.26 The Court found that the decision in *Liddell* extended the section 140 protection without subjecting the statutory provision to analysis or identifying the jurisprudential basis for its conclusion that the necessary connection existed.

4.27 Thus it now appears there is no law that allows third parties such as family members to protection in their own right if their only connection to the matter is a connection to the accused. Third parties can still be covered indirectly by the terms of an order made to protect someone else, if they are part of that person's identifying particulars in terms of s 140(1).

4.28 It seems anomalous that hardship to family members is an accepted factor in the context of a decision to suppress the name of an offender, but in the absence of an order relating to the offender, those same family members cannot be protected from publicity, no matter how extreme the degree of hardship suffered.

> Q33 Given the finding of the Court in *Shapiro*, should there be a legislative provision enabling the court to prevent publication of the identity of persons connected with the accused where the accused's own identity is not the subject of a suppression order?

122 For example, the District Court suppressed the name of a drunk driver's employer but not the identity of the offender, and although the point was not the subject of the appeal to the High Court, the High Court adopted the suppression order in respect of the employer without comment – *Ferris v Police* (28 November 2007) HC INV CRI-2007-425-41, Chisholm J. In *A Defendant v Police* (1997) 14 CRNZ 579, 589, the Court refused to suppress the name of a defendant charged with sexual offending, but found an adequate case made out for the protection of the names, addresses and occupations of his wife and children under section 140. In order to support this order, the Court ordered that the address of the accused was not to be published: only his name and occupation could be published.

123 *R v Shapiro* (6 June 2008) CA 625/07, William Young P, Randerson and Harrison JJ.

124 Ibid, para 19.

125 Ibid para 15, per Harrison J.

Chapter 5

Closing the court

GROUNDS FOR CLOSING THE COURT

Section 138

5.1 As we have already said, the principle of public access to the court is an essential element in the system. As a result the power to close the court is reserved for exceptional cases. Section 138 of the Criminal Justice Act 1985 contains a statutory recognition of the open justice principle,[126] and authorises the closing of the court on the same grounds as evidence and the names of witnesses may be suppressed, namely where the interests of justice, or of public morality, or of the reputation of any victim of any alleged sexual offence or offence of extortion, or of the security or defence of New Zealand so require. In this respect, the powers to close the court appear to be designed to protect evidence or names in circumstances where the evidence or names are so sensitive that suppression orders alone may be insufficient to provide appropriate protection.[127]

5.2 While we agree that there should be a power to close the court on these grounds, closure should be a measure of the last resort. Accordingly, we suggest that the court should be permitted to close the court to protect evidence or names of witnesses only in exceptional circumstances where it is satisfied that the making of suppression orders is insufficient to protect one or more of the interests that are at stake.

5.3 There is another significant situation in which the power to close the court may be required, one that has nothing to do with suppression: where there is such disorder in the court that it is not possible to conduct the trial in public. Although this situation might currently be captured under section 138 on the grounds that it is "in the interests of justice", in our view, preventing disorder should be an explicit ground in the legislation.

5.4 Even if an exclusion order is made under section 138(2)(c), the announcement of the verdict of the court and the passing of sentence must take place in public. In exceptional circumstances, the court may decline to state in public all or any of the facts, reasons or other considerations that it has taken into account in reaching its decision or verdict or in determining the sentence.[128] Where a person

126 *Paraha and ors v New Zealand Police* (24 April 2008) HC AK CRI 2007 092 5673, Heath J, para 14.

127 The statutory power to close the court can be traced back to section 3 of the Criminal Code Amendment 1905, which provided for the exclusion of persons from the court on in the interests of public morality.

128 Criminal Justice Act 1985, s 138(6).

has given assistance to the police or other authorities and wants that assistance to be taken into account at sentencing on a confidential basis, counsel should prepare a joint memorandum for consideration by the sentencing judge, place it in a sealed envelope and file it before the sentencing date. The information should not be referred to in open court, but the judge will take account of it. If the information is particularly sensitive and known only to Crown counsel, a sealed envelope memorandum should be filed and the judge shall determine the nature of any disclosure. [129]

Accredited news media

5.5 Under section 138(2)(c) of the Criminal Justice Act 1985, the court may make an order excluding all or any persons other than the informant, any police employee, the defendant, any counsel engaged in the proceedings, and any officer of the court, from the whole or any part of the proceeding. Section 138(3) provides that this power cannot be used to exclude any *accredited news media reporter*, "except where the interests of security or defence so require". The word 'accredited' is not defined in the Act. It is unclear whether it means that the reporter must be attached to a particular newspaper or broadcasting corporation: if so, it may not include freelance reporters.[130] The same expression is used in section 375A of the Crimes Act 1961 and section 185C of the Summary Proceedings Act 1957, which are discussed below.

5.6 The phrase "accredited media" has been defined in the Family Court context, where a reporter employed by an accredited media organisation may attend a Family Court hearing under the Care of Children Act 2004.[131] A news organisation will be accredited if the organisation is subject to a code of ethics or professional standards and a relevant complaint procedure. The Ministry of Justice holds a registry database of accredited media organisations, and reporters must produce either press identification or a letter from their organisation, introducing them as a bona fide member of staff. Freelance media personnel and media researchers need to seek permission from the judge on a case by case basis in order to enter and report on the court.

Grounds for excluding the media

5.7 Sections 138(2)(c) and suggest 138(3) that the media will only be excluded from the court in rare cases where matters of security or defence arise. However, in a recent pre-trial hearing in relation to the retrial of David Bain, Panckhurst J cleared the court, including the media, from a High Court session to discuss evidence to be called at the retrial. It was reported that the arguments made could have fair trial implications, and should not be made available to the public. The decision has been described as troubling.[132]

129 Sentencing Practice Note [2003] 2 NZLR 575.

130 J Burrows and U Cheer, *Media Law in New Zealand* (5ed, Oxford University Press, Melbourne, 2005) 330.

131 Ministry of Justice *Media Guide for Reporting the Courts* Seond Edition (October 2008), 31, para 5.4 www.justice.govt.nz (accessed 4 December 2008).

132 New Zealand Law Society *Media Law: Rapid change, recent developments* April 2008, 20.

5.8 If, as we have suggested earlier, the court can only be closed because information is so sensitive that suppression orders are inadequate, why should the media be permitted to be present in some cases but not others? Ultimately it would appear to be an issue about the level of trust we have in the media.

5.9 A possible explanation is that there is perceived to be a greater risk of harm from the release of information about defence or security, so that it needs greater protection. In other words, it is more sensitive than other types of information. But is this the case? For example, is information relating to security or defence more sensitive than information that might endanger a person?

5.10 Are there other cases where the media could or should properly be excluded? For example, is it appropriate to exclude the media as Panckhurst J did, where there are concerns that publicity might prejudice a fair trial? We also understand that not infrequently when trials are in progress, discussions are held with counsel in chambers without the media being present where issues about the evidence arise. In *Broadcasting Corporation of New Zealand v Attorney-General*,[133] Cooke J suggested:

> Freedom of access in Chambers between Judge and Counsel is occasionally proper and even vital in criminal cases, provided that counsel on both sides are present.

Arguably chambers discussions excluding the media are appropriate while a trial is underway to prevent the inadvertent release of information while a jury is actively considering the case. We seek views on whether, and if so in what circumstances, it is appropriate for discussions to take place in chambers in the absence of the media, either during the trial or more widely.

Bail hearings

5.11 The question of excluding the media also arises in relation to bail hearings. Section 18 of the Bail Act 2000 provides that the court may order that a bail application be heard in chambers, in the interests of the defendant, or any other person, or the public interest. In practice, members of the media are generally permitted to be present, but the court will usually order that there be no publication of what takes place other than the outcome of the application.

5.12 Under section 19, the court has wide powers to make an order prohibiting publication of the details of a bail hearing, whether the hearing takes place in open court, or in chambers. Bail hearings very frequently involve discussion of prior convictions, alleged previous bad behaviour on the part of the accused, allegations of breach of bail on previous occasions and discussion of the views of victims, all of which may put a fair trial at risk.[134] In the absence of a court order, confusion sometimes arises as to what the media can report and what they cannot when the bail hearing takes place in open court. In the first place, there is some doubt about the scope of the suppression power under section 19.

133 [1982] 1 NZLR 120.

134 Hon Justice A P Randerson, Chief High Court Judge, *Contempt of Court and the Media*, LexisNexis Media Law Conference 2008.

We discuss this issue further in Chapter 8. More generally, it might be argued that material at bail hearings is so prejudicial that suppression ought to be presumptive or automatic. We seek views on this issue.

Excluding the public to protect complainants

5.13 Section 375A of the Crimes Act 1961 contains a statutory power designed to make it easier for a complainant in a sexual case to give evidence. (An almost identical power for preliminary hearings of such a case is set out in section 185C(2) of the Summary Proceedings Act 1957.) Section 375A(2) provides that no person shall be present while such a complainant is giving evidence except the following:

(a) The judge and jury.
(b) The accused and any person who is for the time being acting as custodian of the accused.
(c) Any barrister or solicitor engaged in the proceedings.
(d) Any officer of the court.
(e) Any person who is for the time being responsible for recording the proceedings.
(f) The member of the police in charge of the case.
(g) Any accredited news media reporter.
(h) Any person whose presence is requested by the complainant.
(i) Any person expressly permitted by the judge to be present.

5.14 This power differs slightly from the power to close the court under section 138, as it provides for any person whose presence is requested by the complainant to remain. We agree that the protection provided under section 375A of the Crimes Act 1961 is appropriate. The question arises whether there are any other categories of witnesses that require similar protection. We seek your views.

Q34 When should the court have power to close the court to protect information?

Q35 Should the grounds for closing the court:

(a) Include the same grounds as those available for orders for suppression of evidence, submissions and names of witnesses;
(b) Expressly provide for the court to be closed where there is disorder in court such that it is not possible to conduct the trial in public?

Q36 (a) Is the approach of the Family Court to “accredited media” appropriate in criminal proceedings?

(b) If not, is there some other means of distinguishing legitimate freelance journalists from members of the general public?

Q37 (a) Is the power to exclude the media where matters of security and defence arise appropriate?

(b) Should there be a similar power to exclude the media to protect other interests? If so, which interests?

(c) Should there be power in criminal cases for courts to deal with certain issues in chambers? If so, when is this appropriate?

(d) Are the provisions relating to bail hearings contained in the Bail Act 2000 appropriate? Should there be an automatic prohibition on publication of the content of bail hearings?

Q38 (a) Is the power to exclude the public under section 375A of the Crimes Act 1961/185C of the Summary Proceedings Act 1957 appropriate?

(b) Are there any categories of witness other than complainants in sexual cases who should be protected in this manner?

Chapter 6

Inherent jurisdiction, interim orders and reasons

SCOPE OF INHERENT JURISDICTION

6.1 The High Court is a court of "inherent jurisdiction." This means it has powers to enable it to act effectively as a court of justice – to support its rules of practice, fulfil its judicial functions of administering justice according to law, and prevent any abuse of its processes.[135] A court may exercise its inherent jurisdiction when it faces an issue that it cannot deal with using only statutory powers or the rules of court.

6.2 The inherent jurisdiction has been described as a reserve or fund of powers, a residual source, which the court may draw on when necessary, whenever it is just and equitable to do so.[136] These powers are affirmed (but not created) by section 16 of the Judicature Act 1908. The High Court cannot exercise its inherent jurisdiction in a way that conflicts with statutes, rules or regulations.[137] The inherent jurisdiction can be displaced by legislation.

6.3 The District Courts only have the jurisdiction conferred on them by statute, and do not have a full inherent jurisdiction. However, District Courts do have some inherent powers, which enable them to do what is necessary to exercise their statutory functions, powers and duties, and to control their own processes.[138]

6.4 Section 138(5) of the Criminal Justice Act 1985 makes it clear that the powers conferred under subsection 138(2) to clear the court, suppress evidence, submissions and names of witnesses, are in substitution for any such powers the court had under its inherent jurisdiction, or at common law. In other words, it ousts the inherent jurisdiction of the High Court in this respect. In the past, this subsection has sometimes been taken to apply to all the powers of suppression provided in sections 138 – 141 of the Criminal Justice Act 1985.[139] However,

135 *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA).

136 See Jacob, "The Inherent Jurisdiction of the Court" (1970) CLP 23, 51.

137 *Paraha and ors v New Zealand Police* (24 April 2008) HC AKL CRI 2007 092 5673, Heath J, para 23.

138 *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA).

139 See for example *R v Appelgren* (7 February 1997) HC AK M 51/97, Robertson J.

the High Court has now confirmed that this subsection only ousts the power of the court to go beyond the scope of sections 138(2) and (3) in hearing and determining proceedings that would otherwise be dealt with in public:

> Had Parliament intended to narrow the scope of the inherent jurisdiction in relation to suppression orders, it ought to have amended s 140 in a similar way.[140]

The inherent jurisdiction of the High Court, and the inherent powers of the District Court, therefore still need to be considered in relation to other suppression orders.

6.5 The scope of the remaining inherent jurisdiction is unclear. The approach of the Privy Council would suggest that the courts have no general authority to make orders binding people in their conduct outside the courtroom,[141] but this is not an approach which has found favour with the New Zealand courts. In *Taylor v Attorney-General*,[142] the Court of Appeal held that the inherent jurisdiction empowers a court to make orders which are necessary to enable it to act effectively, and it may even exercise such jurisdiction in respect of matters regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision. In *Muir v CIR*,[143] the Court of Appeal accepted, at least for the purposes of that case, that it had jurisdiction to make confidentiality orders despite the absence of a statutory power to do so, noting in this respect that it was content to follow *Taylor v Attorney-General*, even though that case had been rejected by the Privy Council.

6.6 Is the continued existence of the inherent jurisdiction in relation to suppression orders a problem? There seems no reason in principle for the different approach in sections 138 and 140. The issue is whether in new legislation the inherent jurisdiction should be ousted or retained. The discretion granted under section 140 is a broad one: further powers may seem unnecessary. The margins of the inherent jurisdiction have always been ill-defined, and intentionally so. This creates the risk of uncertainty, and can lead to problems identifying where the margins lie, particularly in the District Court, where the inherent powers are very limited.

6.7 The main advantage of retaining the inherent jurisdiction is that it gives the court the power necessary to enable it to prevent abuse of judicial process or act effectively within its jurisdiction, and to punish for contempt. According to the rule in *Taylor v Attorney-General*, it could be used to supplement the power of a court under the relevant section, but not in a manner contrary to the statutory provision. This creates a measure of flexibility which may be significant when unforeseen circumstances arise. The question is whether, and how often, situations will arise which fall outside the ambit of the statutory provision.

140 *Paraha and ors v New Zealand Police*, above n 137, para 39.

141 *Independent Publishing Co v Attorney-General of Trinidad and Tobago* [2005] 1 AC 190.

142 *Taylor v Attorney-General* , above n 135, 675.

143 *Muir v CIR* [2004] 17 PRNZ 365, para 32.

6.8 An example of the use of the inherent jurisdiction appears in *Taylor* itself, where the court used its inherent jurisdiction to prohibit the publication of anything that might lead to the identification of officers of the New Zealand Security Service (who were giving evidence at the trial of William Sutch), and ordered that they should be described by a letter or symbol in each case. The case was decided before the passage of the Criminal Justice Act 1985, but the Court noted that its existing statutory powers did not extend to authorising an order or direction that witnesses be referred to by letter.[144]

6.9 The disadvantage of retaining the inherent jurisdiction is that it leaves some uncertainty about the scope of the suppression powers. Arguably, given the importance of open justice as a principle, the circumstances in which it can be overridden should be clearly defined in statute and these should be the only circumstances where suppression can occur.

Q39 Should the courts retain a residual inherent jurisdiction in relation to the suppression powers provided in the Criminal Justice Act 1985?

PRESERVING THE COURTS' ABILITY TO MAKE ORDERS

6.10 In *Delivering Justice For All*, the Law Commission asked whether there is a need for statutory restrictions on publishing the name of a person who has been arrested but has not yet appeared in court. If the person's name is published before that appearance, it effectively pre-empts an application for a suppression order. The Law Commission recommended that the publication of identifying details of a person arrested for or charged with an offence before they appear in court should be prohibited, unless the person consents to publication.[145] On further reflection, we do not consider that, if such a presumption is adopted, consent is the appropriate basis upon which publication should be allowed: it assumes that the only issue is the attitude of the accused to publication. Publication may pose risks to a fair trial, or to the safety of others, which will not be alleviated by the consent of the accused.

6.11 In consultation, some journalists referred to a trend in recent cases by some media outlets to publish the name of an accused (particularly if well-known) immediately following arrest, thereby pre-empting any attempt to apply for suppression, as they anticipate the courts may make a suppression order.

6.12 Arguably, publishing the name of a person who has been arrested before they appear in court would be a contempt of court, a contempt of court being "anything which plainly tends to create a disregard of the authority of Courts of justice".[146] However, if it is accepted that it is not desirable for the media to be able to pre-empt the courts' ability to make a suppression order in this way, would it be better to have a clear statutory rule to that effect, rather than relying on contempt?

144 *Taylor v Attorney-General*, above n 135, 680.

145 New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85) Wellington, 2004, Recommendation 155.

146 *Butterworth's New Zealand Law Dictionary*, ed P Spiller (6ed Butterworths 2005). See *C v Wilson & Horton* (27 May 1992) HC AKLD, CP765/92, Williams J, 3.

6.13 In theory, a similar argument could be made in relation to matters of evidence that the media might publish about a case before an accused has appeared in court, and that might pre-empt an application under section 138 for suppression. It is more difficult, however, to frame a statutory rule to preserve the position with regard to section 138, without completely closing down all information about a case. It might be possible to distinguish between categories of information which should not be disclosed before the first court appearance, such as the contents of a search warrant, or other narrow categories.

Q40 Should there be a statutory provision prohibiting the publication of identifying details of a person arrested for or charged with an offence before they appear in court?

Q41 If so, is there merit in considering a similar prohibition in relation to section 138? How might such a prohibition be framed?

INTERIM ORDERS

6.14 One of the concerns expressed by some members of the media in consultation was a view that any case coming before a Justice of the Peace over the weekend will almost routinely result in an interim order for name suppression.

6.15 This concern highlights a distinction between interim orders that are made in the interests of preserving the position, because there is insufficient time or information to make a considered decision, and those that are a considered decision made with the benefit of time, having heard evidence and argument.

6.16 In the case of orders made at short notice, early in the proceedings, the accused may not have the benefit of legal advice, and/or may not have had sufficient time to assemble evidence in support of an application for suppression. In addition, a list court may have 70 to 100 matters to hear in a day. Thus even if all the information is available, the court may not have the time to hear the matter, and may instead impose an interim order in the interests of preserving the position until the matter can be given proper consideration. The difficulty is that the case is generally simply adjourned to another list court, where pressure of time may produce the same result again.

6.17 In South Australia, legislation empowers the court to make a short term interim order when an application is made for a suppression order, without inquiring into the merits of the application. Where such an order is made, the court must determine the substantive application as a matter of urgency, and wherever practicable within 72 hours after making the interim order.[147]

6.18 We doubt that a mechanism should be put in place merely to address the pressures of the list court. If suppression applications were adjourned for a substantive hearing outside a normal list court, that would create immediate scheduling problems, since it would require an additional judge and courtroom to be made available at short notice. But if, as an alternative, applications were simply adjourned from one list court to another on the basis that the court had

147 Evidence Act 1969 (SA), s 69A(3).

insufficient time to deal with it substantively, that would only add to the pressures of the list court and give rise to inefficiencies and delay. We therefore tend to the view that list courts should generally give full consideration to suppression applications on the first occasion when they are made. However, when it is clear that extended argument will be involved, counsel should alert the court in advance that a suppression application will be made so that special arrangements can be considered.

6.19 A mechanism similar to that in South Australia may be useful in cases where the accused has not had the opportunity to assemble the case in favour of name suppression and needs time to obtain legal advice or gather supporting material. Even then, we do not favour the automatic suppression granted in South Australia. At a minimum, the accused should be required to show that there is an arguable case, and the adjournment should be for the minimum period necessary for the purpose for which it is being granted.

6.20 Interim orders that are made for substantive reasons after the hearing of evidence and argument should be revisited as circumstances change. The key issue in our view is that the judge should turn his or her mind to the period for which such an order should be in place. Where interim orders are made, their expiry date should be clearly specified. Although section 140(2) suggests that the duration of the order should be made clear in the order itself, orders are often allowed to run on indefinitely, and uncertainty as to whether a suppression order is in place can result. There has also been difficulty where the term of an interim order has been defined by reference to the next court event rather than by reference to a specific date. It has been held, for example, that an interim order that has to continue until an accused's trial was not and could not be discharged upon his earlier death.[148]

Q42 Should there be statutory provision for short term interim orders to be made where there is an application for name suppression, without the need for the court to inquire into the merits of the application? What would the grounds be for such a provision?

Q43 Should specifying the date for the termination of an interim order be a mandatory requirement?

REASONS

6.21 In preliminary consultation, several reporters commented that judges do not always give reasons for their decisions in granting or declining applications for suppression. The complaint was more strongly expressed in relation to suppression decisions by Justices of the Peace. An absence of reasons makes it more difficult to effectively exercise rights of appeal and review.

148 *R v K (deceased)* (5 July 2007) HC DUN CRI 2007-012-000706, Chisholm J.

6.22 There is no invariable rule established by New Zealand case law that courts must give reasons for their decisions.[149] Nor is there any statutory requirement to give reasons for a decision under sections 138–140 of the Criminal Justice Act 1985. However, the Court of Appeal stated in *Lewis v Wilson & Horton* that the provision of reasons by judges is desirable in this context because:[150]

(a) It is an important part of openness in the administration of justice. Without reasons, it may not be possible to understand why judicial authority has been used in a particular way. The public is excluded from decision making in the courts, and therefore judicial accountability, which is maintained primarily through the requirement that justice be administered in public, is undermined.

(b) Failure to give reasons means that the lawfulness of what is done cannot be assessed by a court exercising supervisory jurisdiction. Without an obligation to give reasons, the right to seek judicial review of a determination will in many cases be undermined.

(c) Giving reasons provides a discipline for the judge which is the best protection against wrong or arbitrary decisions and inconsistent delivery of justice.

6.23 The Court concluded that in the case before it, the requirements of open justice, the provisions of section 14 of the New Zealand Bill of Rights Act, and the need to ensure the possibility of judicial review made it incumbent on the Judge to give reasons for the order prohibiting publication of the appellant's identity. The failure to do so in this case amounted to an error of law.

Q44 Should there be a statutory requirement that reasons must be given for the grant or dismissal of a suppression order?

149 *Lewis v Wilson & Horton* [2000] 3 NZLR 546, para 75; William Wade and Christopher Forsyth *Administrative* Law (9th ed, Oxford University Press, Oxford, 2004) 522.

150 *Lewis v Wilson & Horton*, above n 149, paras 76-82.

Chapter 7

Jurisdiction, standing, terms of orders, appeals and revisiting orders

JURISDICTION AND STANDING

7.1 A challenge to a suppression order may be brought by way of appeal, or by way of judicial review. However, the question of who has standing to challenge an order is not always straightforward. There are a number of gaps in the statutory regime, which can be seen in the cases.

Orders made in the course of a trial

7.2 In *Re Victim X*,[151] the name suppression of the intended victim of a kidnap conspiracy was set aside during the course of a High Court trial, as the Judge considered there had been a change of circumstance since the original suppression order. The victim appealed to the Court of Appeal against the lifting of the name suppression.[152]

7.3 The Court of Appeal held that it did not have jurisdiction to decide the appeal: because the High Court made its order in the course of the trial, jurisdiction for the Court of Appeal to entertain an appeal could not be found in the Crimes Act 1961, which is only concerned with pre-trial and post-trial orders.[153] Nor was there any basis for bringing the appeal within section 66 of the Judicature Act 1908,[154] as that section related to civil matters.

7.4 The purpose of not allowing appeals against orders made in the course of a trial is to prevent the conduct of trials being unduly delayed by appeals. However, this rationale does not apply to suppression orders. A trial does not need to be suspended pending the outcome of an appeal against the grant or refusal of a suppression order: it only delays publication of the suppressed name or evidence.

151 *Re Victim X* [2003] 3 NZLR 220.

152 *Re Victim X* [2003] 3 NZLR 230.

153 Ibid, para 13.

154 Ibid, paras 21, 24, 30.

While suppressing evidence or the name of a participant in the trial pending an appeal may reduce the impact of contemporaneous reporting, on balance we consider there should be a right of appeal against decisions relating to the publication of name or evidence made in the course of a trial.

Standing of media

7.5 The news media have always had the right to seek an audience and be heard on the question of suppression.[155] This standing also extends to the right to apply for suppression orders to be discharged, rescinded or varied.[156] In *R v L*, Smellie J indicated that the appropriate way for the press to proceed was to combine their interests and make submissions by one counsel only, rather than sending along a battalion of counsel.[157]

7.6 Sometimes the route by which an action proceeds may result in the media effectively losing the ability to challenge an order, as an appeal may be required. In *Lewis v Wilson & Horton Ltd*, the Court of Appeal noted that in most cases where a decision is made under section 140, the appropriate procedure for someone who is affected by the decision, but is not a party to the application, will be to seek judicial review of the decision.[158] However, in some cases, such as where a decision is made following an appeal from the grant or refusal of a suppression order, judicial review may not be available. In such cases, it appears that the media do not have a right to appeal the decision.

7.7 In *Fairfax New Zealand Ltd v C*,[159] Fairfax sought leave to appeal against a decision of the High Court overturning a District Court decision to refuse a suppression order. If Fairfax was a "party", it would have a right of appeal to the High Court pursuant to section 144 of the Summary Proceedings Act 1957. Fairfax argued that if the District Court Judge had granted interim name suppression, media interests could have applied to rescind or vary that order, or sought judicial review of the decision. Instead, the District Court refused the order, and that decision was reversed on appeal by the High Court.

7.8 Fairfax submitted that it was anomalous for the media to have lost any right to challenge the name suppression order because of the way in which the matter had progressed.[160] It argued that the Court should interpret the word "party" liberally in the context of section 144, to ensure that the media could perform its role in relation to the criminal justice system as "surrogates of the public". The Court of Appeal held that the interpretation advanced by Fairfax was not

155 *R v L* [1994] 3 NZLR 568.

156 J Burrows and U Cheer, *Media Law in New Zealand* (5ed, Oxford University Press, Melbourne, 2005) 350.

157 *R v L*, above n 155, 570.

158 *Lewis v Wilson and Horton Ltd* [2000] 3 NZLR 546, para 51.

159 *Fairfax New Zealand Ltd v C* [2008] NZCA 39.

160 Ibid, para 10.

justified. It considered that the status of the media in the case was more analogous to that of an intervener appointed under rule 81 of the High Court Rules, who is not a party in terms of appeal rights.[161]

7.9 The Court noted that this was not a case where Fairfax would be without a remedy: the order made was an interim one, and if the District Court made a final order for name suppression when the matter came back before it, Fairfax could bring judicial review proceedings.[162] As the Court acknowledged, this adds procedural complexity and cost to the process, but "[A]ny unevenness of this result is the effect of the statutory arrangements for appeals in this area."[163] We consider, however, that the Court of Appeal may have overstated the position: judicial review would not be available if a final order was refused by the District Court, but then granted by the High Court. Once again, Fairfax would be left without standing to challenge the order, since a decision of the High Court cannot be judicially reviewed.

7.10 The Court also rejected the argument that there was a right of appeal under section 66 of the Judicature Act 1908, despite observations by the Supreme Court in *Mafart v Television New Zealand* that section 66 should be interpreted to avoid anomalies in terms of appeal rights.[164] The Court of Appeal considered that the question of whether a matter is civil or criminal is a question of substance, not form, and that it would be odd to find that the application was not inextricably linked with the criminal process.[165] The Court also declined to revisit the matter under section 57(4) of the Judicature Act 1908, on the basis that it did not have jurisdiction to do so, and rejected the argument that sections 138 to 140 of the Criminal Justice Act 1985 were entirely separate from the underlying proceedings and effectively stand alone.

7.11 The South Australian Evidence Act 1929 provides an example of an extended statutory right of appeal. Section 69AC of the Act provides that an appeal lies against a suppression order, or a decision not to make such an order, or a decision varying, revoking or reviewing a suppression order. Pursuant to section 69AC(2), the people entitled to bring or be heard on an appeal under the section include:

- A representative of a newspaper or a radio or television station;
- A person who appeared in proceedings before the primary court related to the making or review of the suppression order;
- A person who did not appear, but who the appellate court considers has a proper interest in the subject matter of the appeal, and who satisfies the court that the failure to appear in the proceedings before the primary court is not attributable to a lack of proper diligence.

161 Ibid, para 29.

162 Ibid, para 17.

163 Ibid.

164 *Mafart v Television New Zealand* [2006] 3 NZLR 18, paras 37 – 38.

165 *Fairfax New Zealand Ltd v C*, above n 159, para 33.

7.12 The South Australian provision reflects the view that the law should be clear in affording the media the right to be heard on such matters. It was described in one report as recognising the gravity of a suppression order, and its power to interfere with the liberty of the media to report on the administration of justice.[166]

7.13 It seems odd that the ability of the media to be heard on appeals should depend on the route by which the matter proceeds to the higher court. Giving the media a statutory right of appeal in relation to decisions on suppression orders would recognise the reality of the role of the prosecution in a particular case: the prosecution is not an interested party in the context of an appeal against a suppression order, and yet it may be the only party in a position to appeal.

Q45 Should there be a statutory right of appeal against suppression orders made in the course of a trial?

Q46 Should the media and/or other persons who the court considers have a proper interest in the subject matter of the appeal have a statutory right of appeal in relation to decisions on suppression orders?

ABILITY TO CHECK TERMS OF ORDERS

Register of orders

7.14 In preliminary consultation, some journalists mentioned problems they had encountered in checking the terms of suppression orders made by the courts. Where journalists are not in court at the time an order is made, they may not be aware that an order has been imposed. Even if they were present at the time of the order, they may wish to check its terms. They described situations where they have occasionally found court staff unhelpful, or unsure themselves of the precise terms of an order.

7.15 In our research, we heard of cases in which journalists had great difficulty in ascertaining whether there was an order in place in a particular case, and what its terms and duration were. We came across decisions in which the endorsements describing the suppression order at the top of the judgment, which are not always drafted by the judges themselves, were at odds with the content of the orders set out in the body of the judgment. In extreme situations, problems of this nature risk bringing the law itself into disrepute.

7.16 The Ministry of Justice is currently exploring ways in which the Ministry and/or court registry staff might help the mainstream media by providing timely information on the existence and breadth of suppression orders issued by New Zealand courts. One possibility is the establishment of a national register of suppression orders.

166 CM Branson, *Report*, *Section 69 of the Evidence Act, 1929 – 1982* (South Australia, Attorney-General's Department, 1982), 13 – 14, cited in New South Wales Law Reform Commission *Contempt by Publication*, DP 43, July 2000, para 10.101.

7.17 In Australia, the Standing Committee of Attorneys General has agreed to develop draft model provisions to enable harmonised legislation governing suppression/non-publication orders, and has agreed to work being undertaken on a legal and administrative framework for a national electronic register of suppression/non-publication orders.[167]

7.18 A register of suppression orders already exists in South Australia. Section 69A of the Evidence Act 1929 (SA) provides that when a court makes, varies or revokes a suppression order, the court must forward a copy of the order to the registrar as soon as reasonably practicable. The registrar has to establish and maintain a register of all suppression orders, and enter any order in the register immediately after receiving it. The register is open to public search, free of charge, during ordinary office hours.

7.19 When an order is entered in the register, the registrar immediately transmits notice of the order by fax, email or other electronic means to the nominated address of each authorised news media representative. This service is subject to the payment of an annual fee.

7.20 Terms of a suppression order may be obtained from the Suppression Order Registry, which is kept at the Sheriff's Office. Details of a suppression order will not be given over the telephone by registry staff.[168]

7.21 There are a number of issues raised by the prospect of such a register operating in New Zealand, such as who should be entitled to have access to it, and whether it should be available electronically, or in hard copy only. If the register is entirely open to the public, and contains all the suppressed details, is there a risk that the suppression order will be defeated by the very availability of that information on the register?

Courts information officers

7.22 Another option to assist the media in determining the existence and scope of suppression orders is the use of a courts information officer. This role appears to have operated very effectively in Victoria to assist with the dissemination of suppression orders. Among other things, the Victorian courts information officer notifies the media of suppression orders and is a general point of contact for journalists.[169]

Standard form orders

7.23 There are other practical problems which can arise with the way suppression orders are framed. Sometimes the exact terms of the order are unclear, or, as noted above, the wording of the endorsement on the top of the judgment does not accurately reflect the orders made in the judgment. Sometimes judgments do not state the statutory basis on which the suppression orders were made (such as whether they are made under the Criminal Justice Act 1985, and if so, which section, or whether they are made under section 19 of the Bail Act 2000).

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167 Standing Committee of Attorneys General, Communiqué, November 2008.

168 www.courts.sa.gov.au/media/media_handbook/index.html, (accessed 28 August 2008).

169 Andrew T Kenyon *Not Seeing Justice Done: Suppression Orders in Australian Law and Practice* (2006) 27 Adelaide Law Review 279, 293.

7.24 The establishment of a national register, or the use of a courts information officer, would not necessarily solve these issues, although it might help identify them at an early stage. One possibility which might be useful, at least in the context of orders for suppression of name, would be to create some standard form orders, with accompanying standard form endorsements, for use in unexceptional cases. It is more difficult to conceive of standard form orders for suppression of evidence.

7.25 Standard form orders might also assist with a related issue in the way orders for name suppression are often framed. Section 140(1) currently provides that a court may make an order prohibiting the publication of the name, address or occupation of the accused or convicted person, or of any particulars likely to lead to their identification. The language of the section is more specific in this regard than its predecessor, section 46 of the Criminal Justice Act 1954, which gave the court a discretion to prohibit the publication of the person's name, and made it an offence to publish the name or any name or particulars likely to lead to their identification. Under the 1985 legislation the judge can if he or she thinks fit specifically prohibit the publication of identifying particulars, but orders are often made which inadvertently only suppress the name. In that case it is an offence to publish the name or "to evade or attempt to evade the order".[170] It is unclear what this means.

7.26 The way the current provision is framed can result in the identification of the accused. For example, where an accused is both a former prominent sportsman and a prominent television presenter, if one media outlet describes him in one of those ways and another in the other, it does not take long to put two and two together. One answer to this issue is to say judges should do more to require that certain particulars are not published, but another option would be to return to the 1954 statutory formulation, or to have a standard form order which suppresses both names and identifying particulars as a matter of course.

Q47 Do you support the idea of a register of suppression orders?

Q48 Who should be able to access such a register? Should it be open to public search?

Q49 Should any such register be available electronically?

Q50 If a national register is not practicable, do you have any suggestions for other methods by which information about suppression orders might be disseminated?

170 Criminal Justice Act 1985, s 140(5).

Q51 Do you think that standard form orders for suppression of name would be useful?

Q52 What other practical steps could be taken to improve the clarity and accessibility of suppression orders, and to ensure that the endorsements on judgments accurately reflect the terms of the orders made?

INABILITY TO REVISIT ORDERS

7.27 Where a permanent order is made for suppression of evidence or submissions under section 138(2)(a) or (b), the Act permits the court to review the order at any time.[171] However, there is no similar statutory power of review for orders for suppression of name under section 140. There is no apparent reason for the distinction. In practical terms in the High Court it may not matter: in *R v Burns*, the High Court held that there is inherent jurisdiction to review a witness name suppression order, whether that order has been made under section 138 or 140.[172] However, the District Court does not have jurisdiction to discharge or review a final suppression order, in the absence of statutory authority.[173] In our view the powers set out in the legislation to review orders made under section 138(2)(a) and (b) and section 140 should be consistent.

Q53 Should the same legislative right of review apply to the courts' powers under both sections 138 and 140?

171 Criminal Justice Act 1985, s138(4)(c).

172 *R v Burns* [2002] INZLR 387, Chambers J, paras 25 – 26.

173 *Wilson & Horton Ltd v District Court at Otahuhu* [2000] DCR 265.

Chapter 8

Publication and the challenge of the Internet

INTERNET AND EMAIL COMMUNICATION

8.1 The impact of the Internet on suppression orders is an issue of increasing significance. In some cases, names or evidence are suppressed, only to turn up on the Internet, where they may be widely viewed. How far should the existence of material on the Internet, or the risk of its publication on websites, affect orders made by the courts? Until recently, the courts have approached the question of suppression orders and the Internet according to traditional principles.

8.2 The Internet raises risks of frustrating suppression orders for whatever reasons they are made, whether to prevent hardship to an accused or his or her family, or to prevent the risk of prejudice to a fair trial. One of the risks that the courts have discussed at length recently is prejudice to a fair trial, not just because of pre-trial publicity, but because that publicity may be easily accessible on the Internet long after it has ceased to be current news.

8.3 In *R v B*,[174] the Court of Appeal referred to the risk of jurors making their own Internet inquiries despite judicial directions not to do so. The Court noted in that case that in the absence of interim name suppression, there would have been a very substantial risk that some jurors would have learnt that the appellant was facing, or had faced, allegations of other sexual offending.

8.4 How is a court to respond to the risk of jurors conducting their own Internet research in this way? The Court of Appeal commented in *R v B* that a specific direction to jurors not to Google the defendant may put exactly that possibility into a juror's head: "The reality is that there is no simple and fool-proof way for a trial judge to address the availability on the internet of prejudicial material about the defendant."[175]

174 *R v B* [2008] NZCA 130.

175 Ibid para 79.

8.5 In a recent decision, the District Court took a novel approach to the availability of material on the Internet. In *Police v PIK & Ors*,[176] Judge Harvey made orders directed specifically at publication on the Internet, as opposed to in newspapers or contemporaneous television or radio broadcasts.

8.6 The orders in question were not made under the Criminal Justice Act 1985. One of the three accused in the case was a young person, so the matter was heard in the Youth Court. Section 438 of the Children, Young Persons and their Families Act 1989 therefore applied: there could be no publication of any report of the proceedings except with leave of the court. The section also automatically suppresses the name and any identifying details of the youth offender. Because of public and media interest in the case, Judge Harvey exercised his power to grant leave to the media to report the proceedings, but imposed limitations on the extent of that publication.

8.7 Judge Harvey noted that the intent of the order was that contemporaneous broadcasts or publications could be made in traditional news media , such as the newspaper or as part of a television news programme, or as part of a subsequent in-depth story at a later time. The scope of the suppression order related to the publication of any accounts of what took place in court on the Internet by way of online news publication or stored video or audio files, which can be replayed or accessed later.

8.8 Judge Harvey said that if such material were available, potential jurors could have reference to it, which could well have an adverse affect upon a fair trial. The intent of the limited order was to ensure that a fair trial would not be prejudiced as a result as the availability of information stored on the Internet.[177]

8.9 The Judge discussed the nature of electronic information, including the ability of on-line information systems to preserve information and make it available on demand, and the tendency of electronic information to spread, which he described as a "viral quality". He noted that this posed problems for the justice system, particularly when it comes to whether or not an accused will have a fair trial before a jury who may, "despite stern warnings from the Bench", seek out information using Internet search engines.

8.10 Although initially the order appeared to prohibit publication of accounts of the proceedings in court, as well as ordering that there be no publication of the names or images of the accused on Internet based news dissemination sites, it seems from a decision issued on 3 September that the intention was only to prohibit names or images of the accused appearing on the Internet. We note that this may not operate to prevent future jurors obtaining access to earlier publicity about a case on the Internet: they could, for example, search by the name of the victim.

8.11 Subsequently in a judgment dated 19 September, Judge Harvey declined to renew the order, after hearing from a number of media organisations, who gave evidence of an ability to remove information from the Internet for particular purposes or

176 *Police v PIK & Ors* (25 and 26 August 2008) YC MAN, CRI 2008-292-00378, CRI 2008-092-013286, CRI 2008-092-013287, Judge Harvey, and subsequent decision dated 3 September 2008.

177 Ibid, paras 4 – 5.

a particular period of time. Though this might not eliminate the information from the Internet entirely, it would make it much more difficult for an ordinary Internet user to locate. That being the case, his Honour considered there was no identifiable risk to a fair trial and therefore no basis for the order.

Limiting on-line publication

8.12 What is distinctive about Judge Harvey's original order is not that it prohibited publication on the Internet, but that it *only* prohibited publication on the Internet. Some of the comment which followed the decision criticised it as restricting freedom of speech. In fact, Judge Harvey's original decision allowed for a greater flow of information about the proceeding than would be provided in the absence of his order, when the default position would have been mandatory suppression under the Children, Young Persons and their Families Act 1989.

8.13 It is not unusual for modern suppression orders to prohibit publication of a judgment "in news media or on internet or other publicly accessible database".[178] Sometimes those orders derive specifically from concerns about the impact of Internet publicity, but are expressed in more general terms. The question Judge Harvey's decision raises is whether it is possible to minimise that impact by making orders that relate specifically to the Internet. These could include imposing obligations on media organisations to remove material from the Internet in the period leading up to and during the duration of the trial.

8.14 There are other tools available to deal with the risk of prejudice, such as:

- judicial warnings to ignore pre-trial publicity
- directions to the jury not to conduct their own searches
- delay of the trial, until pre-trial publicity has had a chance to die down
- change of venue
- severance of trials
- suppression orders directed specifically at particular pieces of evidence or particular names
- trial by judge alone.

8.15 Many of these tools may be thwarted by the conduct of jurors if information about the case or the accused is available on the Internet. In terms of risk to a fair trial, the potential impact of the Internet on criminal proceedings therefore depends on the likely conduct of jurors. If information is available on the Internet but jurors do not conduct their own investigations, there is no greater risk of prejudice than with traditional media reports.

8.16 In *R v Rickards*, Randerson J was asked to rule on the question of whether pre-trial publicity had jeopardised a fair trial for the accused. Randerson J concluded that a fair trial was still possible, notwithstanding earlier adverse publicity. He maintained that experience shows that, despite publicity in cases which have attracted widespread media interest, jurors focus on evidence before

178 See for example *R v B*, above n 174.

them as the material most immediately and recently to hand for their assessment, and are responsive to judicial directions to put to one side matters they may have heard outside the court. [179]

8.17 The issue of pre-trial publicity and its impact on jurors has recently been reconsidered by the High Court in *Solicitor-General of New Zealand v Fairfax.*[180] The High Court took into account the views of Elias CJ in *Solicitor-General v W&H Specialist Publications Ltd*,[181] set out below, which it said accorded with the Court's own experience that jurors, faced with the actuality of trial, focus on the evidence presented to them in court and conscientiously approach their task including following judicial directions:

> Prejudice is an effect which distorts the impartiality of the administration of justice. Not every comment about an impending trial will be capable of such effect. The formality of the process of the trial and the obligations of the jurors' oath are steadying factors.

8.18 The Court also relied on similar observations by the High Court of Australia in *Murphy v R*.[182] In that case the Court noted that the might of media publicity in "sensational" cases makes it virtually impossible for a jury to reach its verdict by reference only to the evidence admitted at trial. It referred to the tools that the courts have used in recognition of this, such as adjournment, change of venue, severance of the trial of one co-accused from that of the others, express directions to the jury to exclude from their minds anything they may have heard outside the courtroom and the machinery of challenge for cause. The Court continued:

> It may be that in a particular case none of these remedies will be fully effective. But it is misleading to think that, because a juror has heard something of the circumstances giving rise to the trial, the accused has lost the opportunity of an indifferent jury. The matter was put this way by the Ontario Court of Appeal in *Reg. v Hubbert* [(1975) C.C.C. (2d) 279, at p. 291]:
>
> "In this era of rapid dissemination of news by the various media, it would be naïve to think that in the case of a crime involving considerable notoriety, it would be possible to select 12 jurors who had not heard anything about the case. Prior information about a case, and even the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence."

8.19 In *R v Ferguson; Ex parte Attorney-General*,[183] the Court of Appeal of Queensland observed, allowing an appeal against the grant of a permanent stay on account of adverse pre-trial publicity:

> The jury trial has not been regarded and should not be regarded, as an exotic and delicate contrivance, the integrity of which cannot survive jurors' knowledge of matters adverse to an accused gained other than through admissible evidence.
>
> Jury deliberations take place in an environment peculiarly conducive to the unbiased assessment of evidence with a view to determining guilt or innocence. An empanelled

179 *R v Rickards* (8 November 2005) HC AKL CRI 2005-063-1122, para 97, Randerson J.

180 *Solicitor-General v Fairfax & Anor* (10 October 2008) HC WGN CIV 2008-485-000705, Randerson and Gendall JJ.

181 *Solicitor-General v W&H Specialist Publications* [2003] 3 NZLR 12 at para 25.

182 *Murphy v R* (1989) 167 CLR 94 and 98.

183 *R v Ferguson; Ex parte Attorney-General* [2008] QCA 227.

juror does not commence his or her role as a person undertaking a novel or foreign role. Jurors are aware consciously or subconsciously of the long tradition … of criminal trials in which 12 impartial men and women are deciders of fact, of the unquestioned integrity of the process and its importance to society's fabric. The solemnity and social significance of the jurors' role is reinforced by the formality of the trial and the courtroom setting.

A conclusion by a Judge that his or her fellow citizens are not capable of bringing an impartial mind to bear on the evidence in accordance with the directions of the trial Judge is a conclusion which should not be reached on the basis of speculation.

8.20 Research for a paper prepared by the Law Commission in 1999 found that the impact of pre-trial publicity on juries is in almost all cases minimal.[184] However, the findings in relation to whether jurors tend to follow or disregard judicial directions not to conduct their own inquiries were more equivocal. Out of 48 cases considered, there were five in which jurors made external inquiries about factual material, despite a direction not to do so. The researchers noted that in the other 43 cases, there was no evidence of external inquiries, but by the same token there was nothing to indicate that the jury was dissuaded from doing so by the judge's instruction. Apart from these five cases where the jury obtained additional information about factual issues, jurors not infrequently attempted to obtain additional information on the law, particularly during the trial itself – for example, by looking up definitions of key terminology in the dictionary or taking a legal textbook on fraud into the jury room. The jury gave no indication in any of these cases that they thought their investigations were improper.

8.21 The researchers concluded that while the directions not to conduct external inquiries were adhered to in a majority of cases, there was no evidence that the directions themselves made a difference to the actions of juries in this respect. By and large, juries simply did not seem to appreciate the importance, or did not understand the logic, of restricting themselves to the information presented by the parties and the judge.[185]

8.22 A different issue arises if the suppression order in question is a final order, aimed not at protecting the right to a fair trial but at ensuring the name of the offender is not published for some other reason. Such an order will be undermined by widespread dissemination on the Internet. What options are there for controlling breaches of suppression orders on the Internet? We note by way of example that within 24 hours of Judge Harvey's initial ruling, an on-line search for the suppressed names returned 95 results. As Michael Chesterman asks, isn't any legal regime which purports to control the flow of information bound in due time to look like King Canute?[186] But on the other hand, is it appropriate to abandon suppression orders in legitimate cases simply because they may be breached?

184 New Zealand Law Commission *Juries in Criminal Trials: Part Two: Volume 2: A Discussion Paper* (NZLC PP37, Wellington, 1999) para 7.51.

185 Ibid, paras 7.43 – 7.45.

186 M Chesterman "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America", (1997) 45 *American Journal of Comparative Law*, 109, at 142 – 143.

Q54 Does the risk of jurors obtaining information about an accused or a trial on the Internet suggest the need for greater use of pre-trial suppression orders?

Q55 Should the courts be able to impose suppression orders directed solely at the Internet? If so, how should such orders be framed?

Enforcing orders for suppression of information published electronically

8.23 If a suppression order is breached and suppressed material is made available on the Internet, what penalties are available, and who should be penalised?

8.24 If a suppression order is in place and a report in a traditional medium, such as a newspaper, directs people to a website containing the suppressed details, that might amount to an attempt to evade the order.[187]

8.25 What liability, if any, attaches to the service provider? The New South Wales Law Reform Commission considered this issue in the context of the sub judice rule, asking whether service providers should ever be held liable for material published electronically which prejudices a fair trial, and if so in what circumstances.[188] Is the answer to this question dependent on whether the service provider allows anonymous publication of material? The Commission noted that most Internet service providers and Internet content hosts have no control over the content of information that goes through their systems, although they may have the capacity to include or exclude certain information.[189]

8.26 The Commission recommended that where service providers or content hosts become aware of some contemptuous publication which they carry or host, they should have an obligation to take steps within their means to prevent the material from being further published.[190] They could escape liability by establishing that they had no control over the content placed on the Internet which contained the prejudicial material and that they either did not know the content contained the material, or, having become aware of this, took all reasonable steps to prevent it being published. This was consistent with the framework of the Broadcasting Services Act 1992 (Cth) whereby service providers and content hosts are required to remove content following formal notification by the Australian Broadcasting Authority.[191]

187 J Burrows and U Cheer, *Media Law in New Zealand* (5ed, Oxford University Press, Melbourne, 2005), 339.

188 New South Wales Law Reform Commission *Contempt by Publication* DP 43, July 2000, para 2.101.

189 New South Wales Law Reform Commission *Contempt by Publication* Report 100, June 2003, para 2.63.

190 Ibid, para 2.65.

191 Broadcasting Services Act 1992 (Cth) Sch 5 Pt 4.

Q56 Should a statutory obligation be imposed to the effect that where service providers or content hosts become aware that they are carrying or hosting a publication which is in breach of an order under sections 138 – 140 of the Criminal Justice Act 1985, they must take steps within their means to prevent the material from being further published?

Q57 If so, who should be responsible for formally notifying the service provider or content host?

Meaning of publication, report and account

8.27 In preliminary consultation, our attention was drawn to the fact that the provisions of the Criminal Justice Act 1985 differ in their descriptions of the communications that are prohibited by the various available orders. Some forbid publication in/of any report or account relating to proceedings,[192] while one refers only to publication,[193] and another to publication in any report, with no reference to an account.[194] This raises a number of issues:

- What does publication mean? Should it be defined in the statute?
- What information can be suppressed under these provisions? Does it include information obtained from other sources, outside the courtroom?
- Is the current formulation, of a report or account of proceedings, satisfactory?

Publication

8.28 What does publication mean in the context of section 138 – 141? Does it require written or broadcast communication, or could passing suppressed information from one person to another in conversation breach the provisions? In *Solicitor-General v Smith*,[195] the Court considered that publication involves publicly disclosing or putting material in the public arena. Publication has also been found to occur where pamphlets were handed out to members of the public,[196] and where particulars are disclosed over the Internet.[197]

8.29 In *Television New Zealand v Department of Social Welfare*,[198] Holland J considered the word "publish" in the context of section 24 of the Children and Young Persons Act 1974, which provided that no person should publish any report of proceedings under the Act without leave of the court. He found that no qualification could be applied to the word "publish" so as to restrict it to mean "publish in the news media":

192 See sections 138(2)(a), 139(1) and (2), and 140.

193 Section 138(2)(b).

194 Section 139A.

195 *Solicitor-General v Smith* [2004] 2 NZLR 540.

196 *Sullivan v Hamel-Green* [1970] VR 156, 158.

197 *Re X* [2002] NZAR 938.

198 *Television New Zealand v Department of Social Welfare* [1990] 6 FRNZ 303, 305.

> …if the intention of the provisions is to protect privacy it must be intended to be an offence for a person to hire a public hall and hold a public meeting at which full unedited reports of proceedings in the Children and Young Persons Court should be discussed.

8.30 A second possible qualification of the word "publish" was raised in the case, being "publish to any person other than someone with a particular interest greater than the interest of the general public." The Judge noted that this qualification would be difficult to apply and define.

8.31 In the context of the suppression provisions of the Criminal Justice Act 1985, the legislation already provides a qualification to this effect in section 141. Section 141 provides an exception for publication by the police of the name and particulars of any person who has escaped from custody or failed to attend court when required, if the publication is made to help with recapture or arrest; or for publication of the offender's name or particulars, or details of any offences charged, to various listed officials who require the information for their official duties, or because of their involvement in the offender's sentence or rehabilitation. It seems unlikely that this exception would be required if "publication" (or indeed the words "report or account") were to be interpreted narrowly.

8.32 In our view, as a matter of policy the provisions ought to include word of mouth communication. This is consistent with the meaning of publication in a defamation context, where a statement is "published" if it is communicated to a third party. While publication of suppressed information by way of broadcast, print publication or placement on the Internet breaches an order on a wide scale, widespread gossip can also undermine a suppression order. Nor does the word of mouth communication need to be widespread to render a suppression order pointless in some cases. For example, one can imagine situations in which breaching a suppression order by telling just one person may cause substantial damage, for example where an accused wishes to avoid an employer learning about pending charges.

8.33 Should the legislation define more clearly what publication means? There are two competing interests to be considered in this regard, clarity and flexibility. Providing a statutory definition has the advantage of legal clarity and certainty. If publication is explicitly defined, for the reasons set out above in our view it would be inappropriate to exclude one-to-one communication from the definition. However, including one-to-one communication potentially extends the ambit of the offence much too far. Technically a person would be in breach of an order if they were present in court, heard the name of a defendant, which was suppressed, and told their own spouse, but no one else. Putting aside questions of proof and enforcement, is it the intention of the legislature that this conduct should breach a suppression order? To avoid the law being brought into disrepute, the system would be reliant on police deciding not to prosecute trivial breaches, or the courts discharging without conviction.

8.34 The alternative is to avoid providing a statutory definition of "publication", and leave it to the courts to make decisions on a case by case basis, and to take a robust approach to the meaning of publication in situations which are clearly not intended to be captured by the Act. This has the advantage of reducing the

risk of people being charged and/or convicted (even if discharged) with trivial breaches of suppression orders. The disadvantage is that there will continue to be a degree of uncertainty about the precise meaning of publication.

Q58 Should publication be defined in the legislation?

Q59 If so, should it include passing information by word of mouth?

What can be suppressed?

8.35 Do suppression orders extend to suppressing the same information if it is sourced outside the court, at another time and from other sources? In *Television New Zealand v R* ,[199] the applicant sought to have a prohibition on publication of certain hearsay evidence lifted after the accused had been convicted and his appeal rights exhausted. The Court of Appeal noted that there had been significant media interest in and speculation about the suppressed evidence, speculation which was not in the interests of the administration of justice, and was in itself a reason supporting the revocation of the prohibition order. The prohibition order did not stop the media approaching the potential witness: it was a prohibition on publishing the substance of the proposed evidence as put before the court:

> It is possible that the order might be avoided by detaching the statement from its procedural context; for instance, the potential witness could now be asked to look back and to speculate on the basis of that person's claimed knowledge of the family about what did occur.[200]

8.36 These comments seem to suggest that there may be a gap in the suppression regime, allowing witnesses to be approached outside the court. However, it has been suggested that such conduct might in many circumstances amount to an attempt to subvert the purpose of the suppression order, and thus constitute a contempt.[201]

8.37 In *Solicitor-General v Fairfax*,[202] suppression orders prohibited the publication of certain intercepted communications. The High Court rejected as facile an argument that a ban on publication did not apply if the content of the very same intercepted conversations was derived independently.

8.38 As a matter of policy, a suppression order would be undermined if the information is only protected in so far as it is obtained from the court proceedings. A purposive approach suggests that it is the substance of the information that is important, and is being suppressed, not where it was obtained. If someone leaks intercepted communications to the media, should the court be able to suppress that information even if it was not obtained from the court proceedings? If the aim of the suppression is to prevent prejudice to a fair trial, then the answer must be yes.

199 *Television New Zealand v R* [1996] 3 NZLR 393, also reported as *R v Bain* (1996) 3 HRNZ 108 (CA).

200 Ibid, 397.

201 J Burrows and U Cheer, *Media Law in New Zealand* above n 187, 332.

202 *Solicitor-General v Fairfax & Anor,* above n 180, para 59.

Q60 Do the current suppression provisions extend to suppressing the same information if it is sourced outside the court at another time and from other sources? If not, should the provisions be amended to this effect, and how might such an amendment be phrased?

Meaning of report or account

8.39 Against this background, is the present formulation of a report or account satisfactory, and should the terminology used in the sections be consistent? Burrows and Cheer suggest that the boundaries of the expression "report or account" are somewhat fluid, and are given a liberal interpretation in keeping with the spirit of section 140.[203] A book on the Bain murders which revealed a suppressed name was held to be an account relating to proceedings, and the word "proceedings" was found to include preliminary hearings, depositions and the investigation itself.[204]

8.40 It is not clear why the different sections use different terminology. It might be explicable if all the sections relating to name and identifying particulars used the same phrase, but they do not. Section 138(2)(b) refers to "an order forbidding the publication of the name of any witness or witnesses…", while sections 139 and 140, which relate to victims of sexual offending, and names generally, prohibit publication "in any report or account relating to any proceedings". Section 139A which protects the identity of child witnesses, prohibits publication "in any report of any criminal proceedings".

8.41 Presumably the reference to a report or account of proceedings is intended to ensure that the prohibition on publication is clearly linked to publication in the context of the proceeding: the effect of the order is not intended to be that the suppressed name cannot be published in the future on unrelated matters. It is not clear why the same wording was not considered necessary in the context of suppressing names of witnesses.

8.42 Section 138(2)(a) prohibits publication of any report or account of the whole or any part of the evidence adduced or the submissions made. As noted above, in our view it would defeat the intention of the section if this was taken to mean that the material suppressed is material which was literally obtained from the proceedings, rather than the substance of the information before the court.

Q61 Is there any justification for the inconsistencies in the wording relating to publication in sections 138 – 140? What terminology should be used?

Email distribution of a report or account

8.43 In preliminary consultation, the police asked whether a "report or account relating to the proceedings" would include the mass distribution of an email containing information suppressed by order of the court. Would this amount to publication under section 138(2)(b)? The police noted that with the ease of mass

203 J Burrows and U Cheer, *Media Law in New Zealand* above n 187, 342.

204 *Karam v Solicitor-General* (20 August 1999) HC AKL AP 50/98, 8, Gendall J.

email communication and the increasing use of blogs, material can come into the public domain without the traditional media being involved. They asked whether the wording of the legislation is fit to deal with modern forms of communication. Our preliminary view is that the current wording of the legislation is adequate to deal with such communications.

Q62 Is legislative amendment required to deal with issues of mass distribution by email of material containing information suppressed by court order? If so, what change is required?

The In-Court Media Coverage Guidelines 2003

8.44 The In-Court Media Coverage Guidelines 2003 apply to all proceedings in the Court of Appeal, the High Court, and the District Court.[205] Their express purpose is 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. The Guidelines do not have legislative force, but they are often applied as if they were rules. Guideline 4 expressly states that all matters relating to in-court media coverage are at the discretion of the judge. The source of jurisdiction for orders made under the Guidelines springs from either the inherent jurisdiction of High Court judges,[206] or the inherent power of a District Court to control its own processes.[207]

Content of the Guidelines

8.45 Guideline 2 includes the desirability of open justice as one of the matters to which the court may have regard when making decisions and exercising discretion under the Guidelines. The other matters to be taken into account are the need for a fair trial; the principle that the media have an important role in the reporting of trials as the eyes and ears of the public; the importance of fair and balanced reporting of trials; court obligations to the victims of offences; and the interests and reasonable concerns and perceptions of victims and witnesses.

8.46 Why are photos and sound and visual recording different from accounts of a trial written in print? One argument often made is that the presence of cameras and audio equipment may affect or inhibit witnesses in their testimony, thus possibly affecting the fairness of the trial.[208] Other concerns include the effect of publicity on the accused, the risk of edited highlights of a trial leading to a lack of balance, or the risk of proceedings being trivialised by an entertainment medium.[209]

205 www.justice.govt.nz/media/guidelines.html (accessed 8 November 2008). The Guidelines resulted from a pilot project approved by the Courts Consultative Committee which began in 1995.

206 This can also be used by judges of the Court of Appeal and Supreme Court in their capacity as High Court judges.

207 *Paraha and ors v New Zealand Police* (24 April 2008) HC AKL CRI 2007 092 5673, Heath J para 20.

208 See for example *R v Sila* (6 May 2008) HC CHC CRI 2007-009-006120, Fogarty J, para 15.

209 Burrows and Cheer, *Media Law in New Zealand* above n 187, 327.

8.47 Guideline 10 provides automatic protection for any witness in a criminal trial who seeks it, other than the accused or an official witness.[210] This means the media applicant must ensure the witness is not recognisable when broadcast while giving evidence, or in the case of still photographs, may not be photographed in court giving evidence. The judge may grant more extensive protection on application, and may for example direct that the media covering the trial may not film the witness outside the court during the duration of the trial.[211] The accused can also apply for protection under Guideline 11.

8.48 Schedule 2 of the Guidelines contains standard conditions for television coverage. In summary the standard conditions include that there may be only one camera in the court room, regardless of how many people are given authority to film for television. There is no filming when the court is closed or in chambers, and members of the jury must not be deliberately filmed or shown in any broadcast. There must be no filming of members of the public attending the trial or at a view; or of counsel's papers; or exhibits (without leave of the judge).

8.49 The accused may be filmed when giving evidence (subject to any protection the judge grants under witness protection provisions); in the dock for the first 15 minutes of the day, except during the verdict or sentencing; or at any time during the trial if the accused consents in writing and the judge does not prohibit it. The judge may grant leave to film during sentencing.

8.50 No filming may take place in court in the absence of the judge, unless the judge gives leave. Broadcast of film taken must be delayed for at least ten minutes, unless the trial is an appeal, or it is of the jury's verdict or a sentencing, or the judge gives leave. In those cases, broadcast may be live.

8.51 The media applicant must maintain a copy of all broadcasts using film taken in court or at a view and must supply a copy to the court if requested by the judge. The film taken must not be used, while the trial continues, other than in the programme nominated in the application form, and may not be used in any promotional broadcasts or trailers. Similar standard conditions apply to still photography and radio coverage (allowing for the nature of the different media).[212]

8.52 Some anomalies arise from the Guidelines. For example, the court may direct that a witness not be filmed outside the courtroom, but it appears that such a direction will only bind those media who have applied for in-court coverage.[213] In the absence of a suppression order, other media seem to be free to film and broadcast images of the witness.

210 An official witness is defined in the Guidelines as a witness giving evidence in an official, as opposed to a personal, capacity, or an expert witness.

211 Guideline 11.

212 Schedules 3 and 4 of the Guidelines.

213 Burrows and Cheer, *Media Law in New Zealand* above n 187, 328.

Status of the Guidelines

8.53 The status of the Guidelines has proved controversial and unsatisfactory at times. In *R v Sila*,[214] one High Court Judge recently held that Guidelines 2 and 4 are not a correct statement of the law which applies to a trial judge when considering making orders controlling media coverage. The Judge said that the Guidelines presumed that the trial judge will allow photographing and filming of the accused during the trial, and that these images can be broadcast and published while the trial is in progress. He described that as an error of law, as the trial judge must treat the accused as innocent until there is a verdict of guilty, and in so doing cannot impose, or risk imposing, any punishment. The Judge likened broadcasting and publishing photos of any accused while on trial to the ancient punishment of pillory, and found accordingly that it was prohibited by the common law.

8.54 Soon afterwards, in another High Court case, Keane J came to a quite different conclusion, and held that the Guidelines are entirely compatible with a trial judge's duty to secure that justice is done.[215] He rejected the suggestion that photographing or filming an accused person in the dock was a humiliation akin to pillory:[216]

> An accused person in the dock may well feel humiliated. That is not sufficient of itself to exclude the public from the Courtroom. Newspaper and television coverage does amplify the public gaze to an altogether greater order. That is not sufficient to exclude the media either. A principal purpose of the Guidelines is, after all, to enable the trial Judge, the media cooperating, to prevent any possibility of pillory.

8.55 The opposing views expressed in these decisions lend support to the argument that the current status of the Guidelines can be problematic. Should they be given greater force and effect? If so, should this be by way of rules or regulations?

Q63 Is the content of the Guidelines, and in particular the standard conditions for television coverage and stills photography which appear in the Schedules, appropriate?

Q64 Should the Guidelines be given greater force and effect? If so, should this be by way of rules or regulations?

214 *R v Sila*, above n 208.

215 *R v Crutchley* (16 May 2008) HC HAM CRI 2007-068-0083, Keane J, para 6.

216 Ibid, para 8.

Chapter 9

Contempt, offences and penalties

CONTEMPT

9.1 The law of contempt is concerned with the preservation of an impartial and effective system of justice, and with assessing the risk of interference with the administration of justice. Most commonly, the interference alleged is the risk of compromising the rights of an accused person to a fair trial.[217] To establish contempt, it must be shown that the actions of the particular respondent caused a real risk of interference with the administration of justice.[218]

9.2 Section 138(8) of the Criminal Justice Act 1985 provides that a breach or evasion of an order excluding persons from the proceedings made under section 138(2)(c) may be dealt with as a contempt of court. However, no such express power exists in that Act for breaches of orders made under section 138(2)(a), (suppression of evidence or submissions), and (b), (suppression of name of a witness), or section 140(1), (suppression of name), which are punishable only by a fine. In preliminary consultation the question was raised as to why this difference exists.

9.3 In our view, section 138(8) operates to ensure that the District Court can deal effectively and immediately with a breach of an order to clear the court. A breach of such an order is highly likely to involve disorder in the court, and judges may need to have an offender immediately taken into custody to resolve the matter. The District Court has only those contempt powers conferred by statute (as opposed to the High Court, Court of Appeal and Supreme Court, which have both inherent and statutory powers).

9.4 However, section 138(8) may be unnecessary. Section 401 of the Crimes Act 1961 and section 206 of the Summary Proceedings Act 1957 both provide that if any person wilfully and without lawful excuse disobeys any order or direction of the court in the course of the hearing of any proceedings, a judge can order that the offender be taken into custody and detained until the rising of the court,

217 *Solicitor-General v Fairfax New Zealand Ltd & Anor* (10 October 2008) HC WGN CIV 2008-485-000705, Randerson and Gendall JJ.

218 *Solicitor-General v Wellington Newspapers* [1995] 1 NZLR 45, 47, Eichelbaum J.

and commit him or her to prison for up to three months, or fine him or her up to $1000 for each offence.[219] This appears to cover the situation envisaged by section 138(8).

9.5 Would section 401 of the Crimes Act 1961 also apply to a breach of an order under section 138(2)(a) or (b), or section 140(1)? We note that such a question would only arise if the breach occurred while the hearing was on-going, as section 401 applies only to disobedience of an order or direction of the court during the course of the proceeding. Burrows and Cheer suggest that a deliberate breach of an order might be treated as a common law contempt, as well as an offence under the relevant statute.[220]

9.6 Should the Criminal Justice Act 1985 provide expressly for breaches of other orders made under sections 138 – 140 to be treated as contempt of court? Our preliminary view is that it would be better in the interests of certainty to continue to treat breaches of these orders by way of specific offence provisions, rather than bringing statutory contempt provisions into the picture.

Q65 Is section 138(8) necessary?

Q66 Are further express powers relating to contempt required under the Criminal Justice Act 1985?

OFFENCES

Strict liability

9.7 A person who breaches a suppression order granted under sections 138 – 140 of the Criminal Justice Act 1985 commits an offence of strict liability. That means that the offence will be proved unless the defendant can show, on the balance of probabilities, that he or she acted honestly and with due diligence.[221] In other words, if there is a publication which is prima facie in breach of one of the sections, has the defendant taken all care that a reasonable person would take in the circumstances?[222]

9.8 Should breaching a suppression order be an offence of strict liability? The category of strict liability has been described as allowing a statute to have a meaningful operation without being defeated by difficulties of enforcement, and at the same time leaving open a defence of honest and reasonable mistake.[223] In *Police v News Media Auckland Ltd* the Court concluded that a breach of section

219 Crimes Act 1961, s401(1)(c); Summary Proceedings Act 1954, s206(c).

220 Burrows & Cheer, *Media Law in New Zealand* (5ed, Oxford University Press, Melbourne, 2005), 350, 382.

221 *Police v News Media Auckland Ltd* [1998] DCR 134.

222 *Karam v Solicitor-General* (20 August 1999) HC AKL AP 50/98.

223 *Bailey v Hinch* [1989] VR 78, 86, per Gobbo J, cited in *Police v News Media Auckland Ltd*, above n 221, 139.

140 of the Criminal Justice Act 1985 comes within the category of a strict liability offence, as it provides the sanction for observance of court orders which are very important to the administration of justice and the reduction of harm and hurt to victims, witnesses and defendants when justice so requires.[224]

9.9 The Judge considered that it might be unreasonable to suppose that a prosecutor could acquire accurate knowledge about the workings of a news media organisation and responsibility for a breach within that organisation. Accordingly the object of section 140 was best served by imposing liability prima facie on the publisher organisation, if it or its servants or agents were shown to have breached a non-publication order, while allowing exculpation if it could prove total absence of fault.[225]

Knowledge or recklessness

9.10 An alternative to strict liability would be to require knowledge or recklessness as to whether or not an order was being breached. A person might be reckless in this regard if he or she was aware of a substantial risk that there was a suppression order in place, and having regard to the circumstances known to the person, it was unjustifiable to take the risk.

Tiered offences

9.11 A further possibility would be to create tiered offences, and matching penalties, which cover both unintentional and intentional breaches of suppression orders. In consultation, the police suggested that a system of this kind could be introduced. They noted that culpability is quite different for those who knowingly publish suppressed information on the web, and those who repeat it without knowing that there is a suppression order in place. The police suggested that there could be a high penalty for action undertaken with full *mens rea*.

9.12 The police drew comparisons with the recent penalty provisions in relation to anonymity orders under the Evidence Act 2006.[226] If a person knows about a witness anonymity order, and intentionally breaches it by disclosing the suppressed details or publishing them in an account of the proceedings, he or she is liable on conviction on indictment to a term of imprisonment not exceeding 7 years.[227] If the breach is unintentional, the person commits an offence and is liable on summary conviction to a fine not exceeding $2,000 in the case of an individual, or a fine not exceeding $10,000 in the case of a body corporate.[228]

224 *Police v News Media Auckland Ltd*, above n 221, 141.

225 Ibid, 142.

226 These provisions operate where an offender has been charged with an offence which is to proceed by way of indictment. The prosecution or the defendant may apply for an order excusing the applicant from disclosing to the other party, prior to the preliminary hearing, the name, address, and occupation of any witness; and (except with leave of the judge) any other particulars likely to lead to the witness's identification; and excusing the witness from stating the same at the hearing itself. The judge may make the order if he or she believes on reasonable grounds that the safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed before the trial; and withholding the witness's identity until the trial would not be contrary to the interests of justice.

227 Evidence Act 2006, s 119(1) and (2).

228 Ibid, s 119(3).

9.13 Generally, in sentencing an offender, the court must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender. The decision as to whether to simply increase the available penalties or to introduce a system of tiered offences determines whether culpability in this respect is a matter for trial, being an essential element of the offence, or whether it is simply taken into account by the judge on sentence.

9.14 On the one hand, it could be argued that creating tiered offences offers greater clarity as to what the levels of culpability are, and may afford greater protection to the accused, as the required intention must be made out as an element of the offence. On the other hand, tiered offences introduce greater complexity and potentially increase the number of defended cases, since the accused's state of mind becomes a trial issue rather than a sentencing issue. If culpability is instead left to be taken into account at sentencing and there is a dispute as to whether a breach was intentional or not, this could be dealt with by way of a disputed facts hearing at the time of sentencing.

Q67 Should breaches of orders made under sections 138 – 140 of the Criminal Justice Act 1985 continue to be strict liability offences, so that the offence will be proved unless the defendant can show, on the balance of probabilities, that he or she acted honestly and with due diligence? Or should knowledge or recklessness be required before a breach of an order is established?

Q68 Should there be a tiered system of offences and penalties, with higher penalties available for an intentional offence than for an accidental or inadvertent breach?

PENALTIES

9.15 The penalties for a breach of an order under sections 138 – 140 vary:

(a) A person who breaches, evades or attempts to evade an order made under section 138(2)(a) or (b), or section 140, or who publishes a name or particular in contravention of section 139(1) or (2), is liable on summary conviction to a fine not exceeding $1,000.

(b) A breach, evasion or attempted evasion of an order under section 138(2)(c) may be dealt with as a contempt of court. This means that the maximum penalties are three months imprisonment or a fine of $1,000.[229]

(c) The penalties for a breach of section 139A(1) of the Act differ depending on whether the party in breach is an individual or a body corporate. An individual is liable on summary conviction to a term of imprisonment not exceeding three months, or to a fine of up to $1,000. A body corporate is liable to a fine not exceeding $5,000.

229 Crimes Act 1961, s 401.

9.16 The difference in the penalties available under section 139A of the Act may be attributed to the fact that section 139A was inserted into the Act by an amendment in 1989, and reflected an earlier distinction between offences by individuals and bodies corporate which appeared in the Children and Young Persons Act 1974.[230] The other penalty provisions have not been amended since 1985.

Adequacy of penalties

9.17 The Police Prosecution Service raised questions about the adequacy of the present fines, which have been described recently as "underwhelming".[231] Only the offence set out in section 139A provides a specific and higher penalty for bodies corporate.

9.18 Similar concerns were expressed by the High Court in *Solicitor-General v Fairfax*.[232] Referring to breaches of suppression orders and a breach of section 312K of the Crimes Act 1961 (which prohibits the publication of intercepted communications) the Court observed:

> We are at a loss to understand why these breaches were not prosecuted. Perhaps it had something to do with the fact that the maximum fine for an offence against s312K Crimes Act is only $500 and a maximum fine for breach of a suppression order under s138(7) Criminal Justice Act 1985 is only $1,000. We would urge Parliament to consider a substantial increase in the fines for these offences so that prosecution of offenders is a meaningful deterrent.

9.19 Name suppression provisions in other legislation carry much heavier penalties. For example, under section 95 of the Health Practitioners Competence Assurance Act 2003, the penalty for publishing a suppressed name is $10,000. Under section 263 of the Lawyers and Conveyancers Act 2006, the relevant penalty is $25,000.

9.20 Clause 171 of the Search and Surveillance Powers Bill which was recently introduced into Parliament provides for penalties of $10,000 for an individual and $50,000 for a body corporate for disclosing information acquired through search or surveillance, other than in accordance with a duty. Is this an appropriate penalty? Alternatively should imprisonment be available as it is in South Australia?

9.21 In South Australia, if a person disobeys a suppression order or an order for clearing the court under the Evidence Act 1929, and if the court by which the order was made has power to punish for contempt, the person is guilty of a contempt of the court. Whether or not the court has power to punish for contempt, the person is guilty of an offence, for which the maximum penalty in the case of a natural person is $10,000 or imprisonment for 2 years, and in the case of a body corporate a fine of $120,000.

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230 Section 139A was inserted by section 454(1) of the Children, Young Persons, and their Families Act 1989.

231 New Zealand Law Society *Media Law – rapid change, recent developments* April 2008, 20.

232 *Solicitor-General v Fairfax New Zealand Ltd & Anor* above n 217, para 138.

9.22 The penalties available for a breach of orders made under sections 138 – 140 of the Criminal Justice Act 1985 could be increased significantly, including providing for more significant fines, and a potential term of imprisonment for breaches of orders. The provisions could also be amended to provide for higher fines for corporate bodies in all cases.

9.23 We note that if penalties for breaches of orders are to be increased significantly, the case for a reliable and up to date register of suppression orders to allow journalists to confirm the terms and duration of the order becomes even more compelling.

Q69 Should the penalties for breaches of orders made under section 138 – 140 of the Criminal Justice Act 1985 be increased?

Q70 If so, is the proposed level in the Search and Surveillance Bill 2008 appropriate? If not, what level of fine is appropriate?

Q71 Should sections 138, 139 and 140 provide for higher fines for bodies corporate?

Q72 Should the available penalty for an individual for a breach of section 138, 139 or 140 include a term of imprisonment?

DIVERSION

9.24 How does name suppression apply where a person has been offered diversion by the police? Comments from both judges and reporters in our preliminary consultation indicated that this is an area which merits consideration. One reporter said that clarification of the position would be useful, as he has been told by some lawyers that name suppression is automatic in cases of diversion, while others say there is no statutory basis for that claim.

9.25 The cases have established that name suppression is not automatic in cases of diversion. The fact that an offender is undertaking a police diversion scheme, or has successfully undertaken a diversion scheme so that the charge has been withdrawn, is a factor to be taken into account in determining whether a suppression order should be granted under section 140. In *Younger v New Zealand Police*,[233] Robertson J commented that if it was Parliament's intention that persons who are diverted should enjoy the benefit of orders prohibiting publication of name, that should be expressly provided for in the legislation.

9.26 Doubt arose following the decision of the High Court in *C v Police*,[234] where the Court overturned a decision of a District Court Judge refusing name suppression to an offender who had completed diversion. The District Court Judge considered

233 *Younger v New Zealand Police* (31 October 2000) HC AKL 169/00, Robertson J, para 9.

234 *C v New Zealand Police* (28 June 2007) HC PN CRI 2007 454 19, Wild J.

himself bound by the decision in *Younger*, and did not consider that there was sufficient evidence of special circumstances justifying non- publication of name.

9.27 On appeal, the High Court accepted that name suppression was not automatic for an offender granted diversion, but found that the offer of diversion to a first offender and the successful completion of diversion by that offender are "compelling reasons" or "very special circumstances" justifying a departure from the presumption that all offenders' names should be published.[235] Accordingly name suppression ought to be granted unless there was some quite unusual reason or circumstance requiring publication.

9.28 The High Court granted leave to Fairfax New Zealand Limited to appeal to the Court of Appeal. The Court of Appeal found it had no jurisdiction to hear the appeal, [236] but it made some observations on the relationship between the diversion scheme and suppression orders. It concluded that Wild J had put the matter too highly in treating diversion in itself as a special circumstance justifying a departure from the open justice principle. It was a relevant factor to be considered in the exercise of the section 140 discretion. In each case it will be necessary to be satisfied that there is a basis for suppression.[237] In the absence of legislative intervention, the Registrar's decision still requires the exercise of the discretion in terms of section 140.[238]

9.29 It seems that if name suppression is to follow automatically on diversion, a legislative amendment is required. In his decision, Wild J noted some of the features of the diversion scheme:[239]

- it is available only to first offenders;
- it is not available for serious crime;
- the views of the victim and the officer in charge are taken into account;
- it aims to give an offender a second chance, without having the black mark of a criminal conviction on his or her record
- it requires the offender to accept full responsibility for the offending and to make good any damage caused to the best of his or her ability;
- it aims to prevent re-offending by fostering the offender's rehabilitation, in particular by the use of community resources such as counselling.

9.30 Wild J argued that most, if not all, of these aims would be defeated if the name or other identifying particulars of an offender granted diversion were published, and concluded that it was fundamental to the whole point of diversion.[240] It is debatable, in our view, whether publication would defeat the aims of diversion. Publication would not result in the offender having a criminal record, or affect his or her chances of using community resources for rehabilitation.

235 Ibid, para 20.

236 *Fairfax New Zealand Ltd v C & New Zealand Police* [2008] NZCA 39.

237 Ibid, para 54. There appears to be a mistake in the judgment: paragraph 54 states that "In each case it will be necessary to be satisfied that there is a basis for diversion." In the context of the Court's finding, it seems likely that the work "diversion" in that sentence should read "suppression."

238 Ibid, para 54.

239 *C v New Zealand Police* above n 234, para 17.

240 Ibid.

It may mean that people become aware of the offending, but the impact of this on the offender's reputation should not be overstated: the very fact that diversion resulted indicates that the matter was not a serious one, and that the person was a first time offender.

9.31 Moreover, the opposing view is that all these matters can be taken into account by a court when exercising its discretion under section 140. If name suppression is to automatically follow diversion, why should it not automatically follow a discharge without conviction under section 106 of the Sentencing Act 2002, or an acquittal?

Q73 Should section 140 be amended to provide for automatic name suppression where offenders are subject to the police diversion scheme?

Registrar's powers

9.32 In *Fairfax New Zealand Ltd v C*, the Court noted that section 36(1B) of the Summary Proceedings Act 1957 expressly recognises the possibility of diversion, and allows the registrar to make a permanent order under section 140 of the Criminal Justice Act 1985 where leave has been granted for an information to be withdrawn, and the informant agrees to the making of the order.

9.33 However, in the present case the registrar's decision to suppress the name of the offender had been made on an interim basis under section 46A of the Summary Proceedings Act 1957, which gives the registrar power to make a name suppression order for up to 28 days in certain circumstances. This power can only be authorised once in relation to any particular information.[241] The registrar then tried to renew the order under the same section when the offender was offered diversion. This decision was challenged by a reporter, and so the matter of suppression had to be referred to a judge.

9.34 The Court noted that the idea of giving registrars these powers was to free up the time of judges from matters that were administrative or undisputed, but that the Parliamentary debates indicate that it was envisaged that registrars were exercising a discretion for which they would receive some training, and that if a matter became complicated or controversial, the registrar could decline to exercise the power and ensure that a judge considered the matter. In that context, the debates also suggested that the requirement under section 36 of the Summary Proceedings Act 1957 for consent of the informant was seen as a safeguard.[242]

9.35 However, the current practice is not for the police to actually consent to the registrar making an order under section 140, but rather for them not to object. In our view, while it may have administrative advantages, the registrar's power under section 36 of the Summary Proceedings Act 1957 to make an order under section 140 of the Criminal Justice Act 1985 is misconceived. The informant in this situation has no interest in the decision. If that requirement of agreement is removed, should it be a function of a registrar to be able to make a final suppression order, which is essentially an exercise of judicial discretion?

241 Summary Proceedings Act, s46A(3).

242 *Fairfax New Zealand Ltd v C* above n 236, paras 59 – 61.

> Q74 Should the registrar retain the power to make a final order for suppression under section 36(1B) of the Summary Proceedings Act 1957?

ALCOHOL OR DRUG-RELATED OFFENCES

9.36 Section 66 of the Land Transport Act 1998 provides that, unless for special reasons the court thinks fit to order otherwise, the power to prohibit the publication of the names of accused persons or of reports or accounts of their arrest, trial, conviction, or sentence conferred on a court by section 138 or section 140 of the Criminal Justice Act 1985, or by any other enactment, is not exercisable in the case of a person who is convicted of an offence against any of sections 56 to 62.[243] Special reasons can attach to the offender as well as to the offence.

9.37 This rule is rigidly applied.[244] The threshold created by section 66 is high: something out of the ordinary or even exceptional is required.[245] Special reasons for ordering suppression were found in *Hyde v F*,[246] where F suffered an illness which caused her some embarrassment. In *D v MOT*,[247] name suppression was granted on the grounds that seeing the appellant's name in the paper would have detrimentally affected the appellant's grandmother's mental health.

9.38 Offences involving driving while under the influence of drugs or alcohol have been treated as a special category in name suppression terms for many years in New Zealand. The Transport Acts of 1949 and 1962 both provided that names of drivers under the influence of drink or drugs were not to be suppressed.[248] The power to suppress names where there are special reasons was introduced in 1985.[249]

9.39 Why should these offences be singled out for special treatment in relation to name suppression? Presumably the rationale is that the prospect of being "named and shamed" will have a deterrent effect on drivers. This could apply equally to a number of other offences.

9.40 It is not clear what impact, if any, the higher threshold for name suppression has on reporting of convictions for these offences.

243 These offences are: s56 – contravention of specified breath or blood-alcohol limit; s57 – contravention of specified breath or blood-alcohol limit by person younger than 20; s58 – contravention of s12 (persons not to drive while under influence of alcohol or drugs); s59 – failure or refusal to remain at specified place or to accompany enforcement officer; s60 – failure or refusal to permit blood specimen to be taken; s61 – person in charge of motor vehicle causing injury or death; s62 – causing injury or death in circumstances to which section 61 does not apply, but while under the influence of drugs and/or alcohol.

244 J Burrows & U Cheer *Media Law in New Zealand*, above n 220, 337.

245 *Croad v Hughes* (1994) 12 CRNZ 364, *Ferris v Police* (28 November 2007) HC INV CRI-2007-425-41, Chisholm J.

246 (19 September 1988) HC DUN AP89/87, Robertson J.

247 (9 July 1991) HC CHC AP165/91, Tipping J.

248 Transport Act 1949, s42; Transport Act 1962, s61.

249 Criminal Justice Act 1985, s150.

Q75 Should offences under section 56 to 62 of the Land Transport Act 1998 continue to be treated differently in name suppression terms from other offences?

Q76 Are there any other offences that justify a particularly high threshold before name suppression will be granted?

Appendices

Appendix A
List of Questions

We welcome your views on the following questions, based on issues discussed in this paper. Please feel free however to make any other comments or submissions in relation to this review. Information on how to make a submission appears on page iv of the Issues Paper.

CHAPTER 2

Q1 Is open justice the appropriate starting point when considering publication of evidence? If so, on what grounds should it be able to be rebutted?

Q2 Do you agree that the following grounds are no longer appropriate:

(a) public morality;

(b) the protection of the reputation of victims of sexual offences and extortion?

Q3 Should the security or defence of New Zealand continue to be a ground for suppression of evidence?

Q4 Is protection of the right to a fair trial an appropriate ground? If so, what level of risk needs to be shown to rebut the presumption of open justice?

Q5 Are the following new grounds appropriate:

(a) undue hardship to victims;

(b) the maintenance of the law;

(c) the safety of any person?

Q6 Is there a need for a residual ground for suppression of evidence? If so, is the "interests of justice" the appropriate test, or is there a more specific test which should be adopted?

Q7 Should the formulation of "undue hardship to the victim" be adopted in preference to the ground set out in section 375A(4) of the Crimes Act 1961, (which provides for the court to prohibit publication of details of the criminal acts alleged in sexual cases, if the court is of the opinion the interests of the complainant so require)?

Q8 Should the courts have the power to make blanket suppression orders?

Q9 If not, is there a need for a statutory prohibition on orders of this nature?

CHAPTER 3

Q10 Do you agree that the presumption of open justice should apply to suppression of the names of accused and convicted persons?

Q11 Do you agree that:

(a) protection of the right to a fair trial;

(b) undue hardship to victims; and

(c) the interests of justice;

are appropriate grounds for suppression of the names of accused and convicted persons? Why/why not? Are there any other grounds that should be considered?

Q12 Should there be a statutory list of factors to assist in determining what the interests of justice require?

Q13 (a) Should hardship to the accused be a factor to be taken into account in name suppression applications?

(b) If so, what level of hardship should be required?

(c) Is a different threshold appropriate for people such as family members of the accused?

Q14 (a) Should the fact that name suppression may have a greater impact on well known people affect suppression decisions? If so, why?

(b) Should it be listed as a separate statutory factor, and if so in what way?

Q15 Should privacy be a factor to be taken into account in applications for name suppression? If so, what does privacy mean in this context?

Q16 (a) Should the seriousness of the offending be a factor to be taken into account in applications for interim name suppression?

(b) If so, how should it operate before and after trial?

Q17 (a) For what purposes should the views of the victim be taken into account as a factor in name suppression applications?

(b) What weight should attach to those views?

Q18 (a) Should futility be a reason for declining suppression orders?

(b) Are there circumstances where suppression orders should be made despite an earlier publication? If so, what are they?

Q19 If there is a statutory list of factors to be considered in name suppression cases, should it be exclusive, or non-exhaustive?

Q20 Are there other factors which should be included in a list of statutory criteria?

Q21 (a) Should there be greater protection given at the pre-trial stage to protect the reputations of people who have been charged with offences?

(b) If so, should open justice remain the starting point, with impact on reputation being a factor to be taken into account in pre-trial suppression decisions? Is the hardship factor adequate to deal with this, or should there be a specific factor relating to the risk of irreparable damage to reputation?

(c) Alternatively, should the names of the persons charged be suppressed pre-trial with power to publish if required in the public interest?

(d) Is there any merit in the South Australian requirement of equal publicity to acquittal?

CHAPTER 4

Q22 Is the current automatic suppression provision in section 139 of the Criminal Justice Act 1985 justified?

Q23 Should section 139 be amended to make it clear that a victim can apply for disclosure of their name at any time, including after a trial is completed?

Q24 Should the automatic name suppression provisions be extended to further categories of crime victim, such as victims of domestic violence, or victims under the age of 17? If so, what categories and why?

Q25 Alternatively, should there be automatic name suppression for all crime victims subject to the power of the court to order publication?

Q26 Is open justice the appropriate starting point for publication of victims' names in some or all cases?

Q27 Do you agree the presumption of open justice should be rebutted if publication of the name of the victim:

(a) would endanger the safety of any person;

(b) would result in undue hardship to the victim;

(c) for any other reason would not be in the interests of justice?

Q28 Is the current automatic suppression provision in section 139A of the Criminal Justice Act 1985 justified?

Q29 Should child witnesses be entitled to apply for disclosure of their name when they reach the age of 17?

Q30 Do you agree that open justice is the appropriate starting point in the case of witnesses' names? If so, what grounds should rebut the presumption?

Q31 Do you agree that appropriate grounds include:

(a) that publication would endanger the safety of any person;

(b) that publication would involve undue hardship to the victim or witness;

(c) that for any other reason publication would not be in the interests of justice?

Q32 Are the protections contained in the following provisions in relation to suppression of the names of witnesses appropriate:

(a) anonymity orders under the Evidence Act 2006;

(b) sections 108 and 109 of the Evidence Act 2006, relating to undercover police officers;

(c) section13A of the New Zealand Security Intelligence Service Act 1969?

Q33 Given the finding of the Court in *Shapiro*, should there be a legislative provision enabling the court to prevent publication of the identity of persons connected with the accused where the accused's own identity is not the subject of a suppression order?

CHAPTER 5

Q34 When should the court have power to close the court to protect information?

Q35 Should the grounds for closing the court:

(a) Include the same grounds as those available for orders for suppression of evidence, submissions and names of witnesses;

(b) Expressly provide for the court to be closed where there is disorder in court such that it is not possible to conduct the trial in public?

Q36 (a) Is the approach of the Family Court to "accredited media" appropriate in criminal proceedings?

(b) If not, is there some other means of distinguishing legitimate freelance journalists from members of the general public?

Q37 (a) Is the power to exclude the media where matters of security and defence arise appropriate?

(b) Should there be a similar power to exclude the media to protect other interests? If so, which interests?

(c) Should there be power in criminal cases for courts to deal with certain issues in chambers? If so, when is this appropriate?

(d) Are the provisions relating to bail hearings contained in the Bail Act 2000 appropriate? Should there be an automatic prohibition on publication of the content of bail hearings?

Q38 (a) Is the power to exclude the public under section 375A of the Crimes Act 1961/185C of the Summary Proceedings Act 1957 appropriate?

(b) Are there any categories of witness other than complainants in sexual cases who should be protected in this manner?

CHAPTER 6

Q39 Should the courts retain a residual inherent jurisdiction in relation to the suppression powers provided in the Criminal Justice Act 1985?

Q40 Should there be a statutory provision prohibiting the publication of identifying details of a person arrested for or charged with an offence before they appear in court?

Q41 If so, is there merit in considering a similar prohibition in relation to section 138? How might such a prohibition be framed?

Q42 Should there be statutory provision for short term interim orders to be made where there is an application for name suppression, without the need for the court to inquire into the merits of the application? What would the grounds be for such a provision?

Q43 Should specifying the date for the termination of an interim order be a mandatory requirement?

Q44 Should there be a statutory requirement that reasons must be given for the grant or dismissal of a suppression order?

CHAPTER 7

Q45 Should there be a statutory right of appeal against suppression orders made in the course of a trial?

Q46 Should the media and/or other persons who the court considers have a proper interest in the subject matter of the appeal have a statutory right of appeal in relation to decisions on suppression orders?

Q47 Do you support the idea of a register of suppression orders?

Q48 Who should be able to access such a register? Should it be open to public search?

Q49 Should any such register be available electronically?

Q50 If a national register is not practicable, do you have any suggestions for other methods by which information about suppression orders might be disseminated?

Q51 Do you think that standard form orders for suppression of name would be useful?

Q52 What other practical steps could be taken to improve the clarity and accessibility of suppression orders, and to ensure that the endorsements on judgments accurately reflect the terms of the orders made?

Q53 Should the same legislative right of review apply to the courts' powers under both sections 138 and 140?

CHAPTER 8

Q54 Does the risk of jurors obtaining information about an accused or a trial on the Internet suggest the need for greater use of pre-trial suppression orders?

Q55 Should the courts be able to impose suppression orders directed solely at the Internet? If so, how should such orders be framed?

Q56 Should a statutory obligation be imposed to the effect that where service providers or content hosts become aware that they are carrying or hosting a publication which is in breach of an order under sections 138 – 140 of the Criminal Justice Act 1985, they must take steps within their means to prevent the material from being further published?

Q57 If so, who should be responsible for formally notifying the service provider or content host?

Q58 Should publication be defined in the legislation?

Q59 If so, should it include passing information by word of mouth?

Q60 Do the current suppression provisions extend to suppressing the same information if it is sourced outside the court at another time and from other sources? If not, should the provisions be amended to this effect, and how might such an amendment be phrased?

Q61 Is there any justification for the inconsistencies in the wording relating to publication in sections 138 – 140? What terminology should be used?

Q62 Is legislative amendment required to deal with issues of mass distribution by email of material containing information suppressed by court order? If so, what change is required?

Q63 Is the content of the Guidelines, and in particular the standard conditions for television coverage and stills photography which appear in the Schedules, appropriate?

Q64 Should the Guidelines be given greater force and effect? If so, should this be by way of rules or regulations?

CHAPTER 9

Q65 Is section 138(8) necessary?

Q66 Are further express powers relating to contempt required under the Criminal Justice Act 1985?

Q67 Should breaches of orders made under sections 138 – 140 of the Criminal Justice Act 1985 continue to be strict liability offences, so that the offence will be proved unless the defendant can show, on the balance of probabilities, that he or she acted honestly and with due diligence? Or should knowledge or recklessness be required before a breach of an order is established?

Q68 Should there be a tiered system of offences and penalties, with higher penalties available for an intentional offence than for an accidental or inadvertent breach?

Q69 Should the penalties for breaches of orders made under section 138 – 140 of the Criminal Justice Act 1985 be increased?

Q70 If so, is the proposed level in the Search and Surveillance Bill 2008 appropriate? If not, what level of fine is appropriate?

Q71 Should sections 138, 139 and 140 provide for higher fines for bodies corporate?

Q72 Should the available penalty for an individual for a breach of section 138, 139 or 140 include a term of imprisonment?

Q73 Should section 140 be amended to provide for automatic name suppression where offenders are subject to the police diversion scheme?

Q74 Should the registrar retain the power to make a final order for suppression under section 36(1B) of the Summary Proceedings Act 1957?

Q75 Should offences under section 56 to 62 of the Land Transport Act 1998 continue to be treated differently in name suppression terms to other offences?

Q76 Are there any other offences that justify a particularly high threshold before name suppression will be granted?

Appendix B

Provisions of the Criminal Justice Act 1985

138 POWER TO CLEAR COURT AND FORBID REPORT OF PROCEEDINGS

(1) Subject to the provisions of subsections (2) and (3) of this section and of any other enactment, every sitting of any court dealing with any proceedings in respect of an offence shall be open to the public.

(2) Where a court is of the opinion that the interests of justice, or of public morality, or of the reputation of any victim of any alleged sexual offence or offence of extortion, or of the security or defence of New Zealand so require, it may make any one or more of the following orders:

(a) An order forbidding publication of any report or account of the whole or any part of –

(i) The evidence adduced; or

(ii) The submissions made:

(b) An order forbidding the publication of the name of any witness or witnesses, or any name or particulars likely to lead to the identification of the witness or witnesses:

(c) Subject to subsection (3) of this section, an order excluding all or any persons other than the informant, any Police employee, the defendant, any counsel engaged in the proceedings, and any officer of the court from the whole or any part of the proceedings.

(3) The power conferred by paragraph (c) of subsection (2) of this section shall not, except where the interests of security or defence so require, be exercised so as to exclude any accredited news media reporter.

(4) An order made under paragraph (a) or paragraph (b) of subsection (2) of this section –

(a) May be made for a limited period or permanently; and

(b) If it is made for a limited period, may be renewed for a further period or periods by the court and

(c) If it is made permanently, may be reviewed by the court at any time.

(5) The powers conferred by this section to make orders of any kind described in subsection (2) of this section are in substitution for any such powers that a court may have had under any inherent jurisdiction or any rule of law; and no court shall have power to make any order of any such kind except in accordance with this section or any other enactment.

(6) Notwithstanding that an order is made under subsection (2)(c) of this section, the announcement of the verdict or decision of the court (including a decision to commit the defendant for trial or sentence) and the passing of sentence shall in every case take place in public; but, if the court is satisfied that exceptional circumstances so require, it may decline to state in public all or any of the facts, reasons, or other considerations that it has taken into account in reaching its decision or verdict or in determining the sentence passed by it on any defendant.

(7) Every person commits an offence and is liable on summary conviction to a fine not exceeding $1,000 who commits a breach of any order made under paragraph (a) or paragraph (b) of subsection (2) of this section or evades or attempts to evade any such order.

(8) The breach of any order made under subsection (2)(c) of this section, or any evasion or attempted evasion of it, may be dealt with as contempt of court.

(9) Nothing in this section shall limit the powers of the court under sections 139 and 140 of this Act to prohibit the publication of any name.

139 PROHIBITION AGAINST PUBLICATION OF NAMES IN SPECIFIED SEXUAL CASES

(1AA) The purpose of this section is to protect persons upon or with whom an offence referred to in subsection (1) or subsection (2) has been, or is alleged to have been, committed.

(1) No person shall publish, in any report or account relating to any proceedings commenced in any court in respect of an offence against any of sections 128 to 142A of the Crimes Act 1961, or in respect of an offence against section 144A of that Act, the name of any person upon or with whom the offence has been or is alleged to have been committed, or any name or particulars likely to lead to the identification of that person, unless –

(a) That person is of or over the age of 16 years; and

(b) The court, by order, permits such publication.

(1A) However, the court must make an order referred to in subsection (1)(b), permitting any person to publish the name of a person upon or with whom any offence referred to in subsection (1) has been or is alleged to have been committed, or any name or particulars likely to lead to the identification of that person, if –

(a) that person –

(i) is aged 16 years or older (whether or not he or she was aged 16 years or older when the offence was, or is alleged to have been, committed) and

(ii) applies to the court for such an order; and

(b) the court is satisfied that that person understands the nature and effect of his or her decision to apply to the court for such an order.

(2) No person shall publish, in any report or account relating to proceedings in respect of an offence against section 130 or section 131 of the Crimes Act 1961, the name of the person accused or convicted of the offence or any name or particulars likely to lead to the person's identification.

(2A) However, a court must order that any person may publish the name of a person convicted of an offence against section 130 or section 131 of the Crimes Act 1961, or any name or particulars likely to lead to the person's identification, if –

(a) the victim (or, if there were 2 or more victims of the offence, each victim) of the offence –

(i) is aged 16 years or older (whether or not he or she was aged 16 years or older when the offence was, or is alleged to have been, committed) and

(ii) applies to the court for such an order; and

(b) the court is satisfied that the victim (or, as the case requires, each victim) of the offence understands the nature and effect of his or her decision to apply to the court for such an order; and

(c) No order or further order has been made under section 140 prohibiting the publication of the name, address, or occupation, of the person convicted of the offence, or of any particulars likely to lead to that person's identification.

(2B) An order made under subsection (2A) in respect of the name of a person, or of any name or particulars likely to lead to the identification of a person, ceases to have effect if –

(a) the person applies to a court for an order or further order under section 140 prohibiting the publication of his or her name, address, or occupation, or of any particulars likely to lead to his or her identification; and

(b) the court makes the order or further order under section 140.

(3) Every person commits an offence and is liable on summary conviction to a fine not exceeding $1,000 who publishes any name or particular in contravention of subsection (1) or subsection (2) of this section.

139 A PROTECTION OF IDENTITY OF CHILDREN CALLED AS WITNESSES IN CRIMINAL PROCEEDINGS

(1) Subject to subsection (2) of this section, no person shall publish, in any report of any criminal proceedings in any Court, the name of any person under the age of 17 years who is called as a witness in those proceedings or any particulars likely to lead to the identification of that person.

(2) Nothing in subsection (1) of this section prevents the publication of the name of the defendant or the nature of the charge.

(3) Every person who acts in contravention of subsection (1) of this section commits an offence and is liable on summary conviction, –

(a) In the case of an individual, to imprisonment for a term not exceeding 3 months or to a fine not exceeding $1,000:

(b) In the case of a body corporate, to a fine not exceeding $5,000.

140 COURT MAY PROHIBIT PUBLICATION OF NAMES

(1) Except as otherwise expressly provided in any enactment, a court may make an order prohibiting the publication, in any report or account relating to any proceedings in respect of an offence, of the name, address, or occupation of the person accused or convicted of the offence, or of any other person connected with the proceedings, or any particulars likely to lead to any such person's identification.

(2) Any such order may be made to have effect only for a limited period, whether fixed in the order or to terminate in accordance with the order; or if it is not so made, it shall have effect permanently.

(3) If any such order is expressed to have effect until the determination of an intended appeal, and no notice of appeal or of application for leave to appeal is filed or given within the time limited or allowed by or under the relevant enactment, the order shall cease to have effect on the expiry of that time; but if such a notice is given within that time, the order shall cease to have effect on the determination of the appeal or on the occurrence or non-occurrence of any event as a result of which the proceedings or prospective proceedings are brought to an end.

(4) The making under this section of an order having effect only for a limited period shall not prevent any court from making under this section any further order having effect either for a limited period or permanently.

(4A) When determining whether to make any such order or further order in respect of a person accused or convicted of an offence and having effect permanently, a court must take into account any views of a victim of the offence, or of a parent or legal guardian of a victim of the offence, conveyed in accordance with section 28 of the Victims' Rights Act 2002.

(5) Every person commits an offence and is liable on summary conviction to a fine not exceeding $1,000 who commits a breach of any order made under this section or evades or attempts to evade any such order.

141 PUBLICATION BY OR AT REQUEST OF POLICE, ETC

Nothing in sections 138 to 140 of this Act shall prevent –

(a) The publication by or at the request of any Police employee of the name, address, or occupation of any person who has escaped from lawful custody or has failed to attend any court when lawfully required to do so, or of any particulars likely to lead to that person's identification, if that publication is made for the purpose of facilitating that person's recapture or arrest:

(b) The publication of the name, address, or occupation of any person, or any particulars likely to lead to the identification of any person, or any details of the offences charged to –

(i) Any person assisting with the administration of the sentence imposed on the person or with the rehabilitation of the person or

(ii) Any Police employee, or any officer or employee of the Department of Corrections or of the Department for Courts, who requires the information for the purposes of his or her official duties.

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