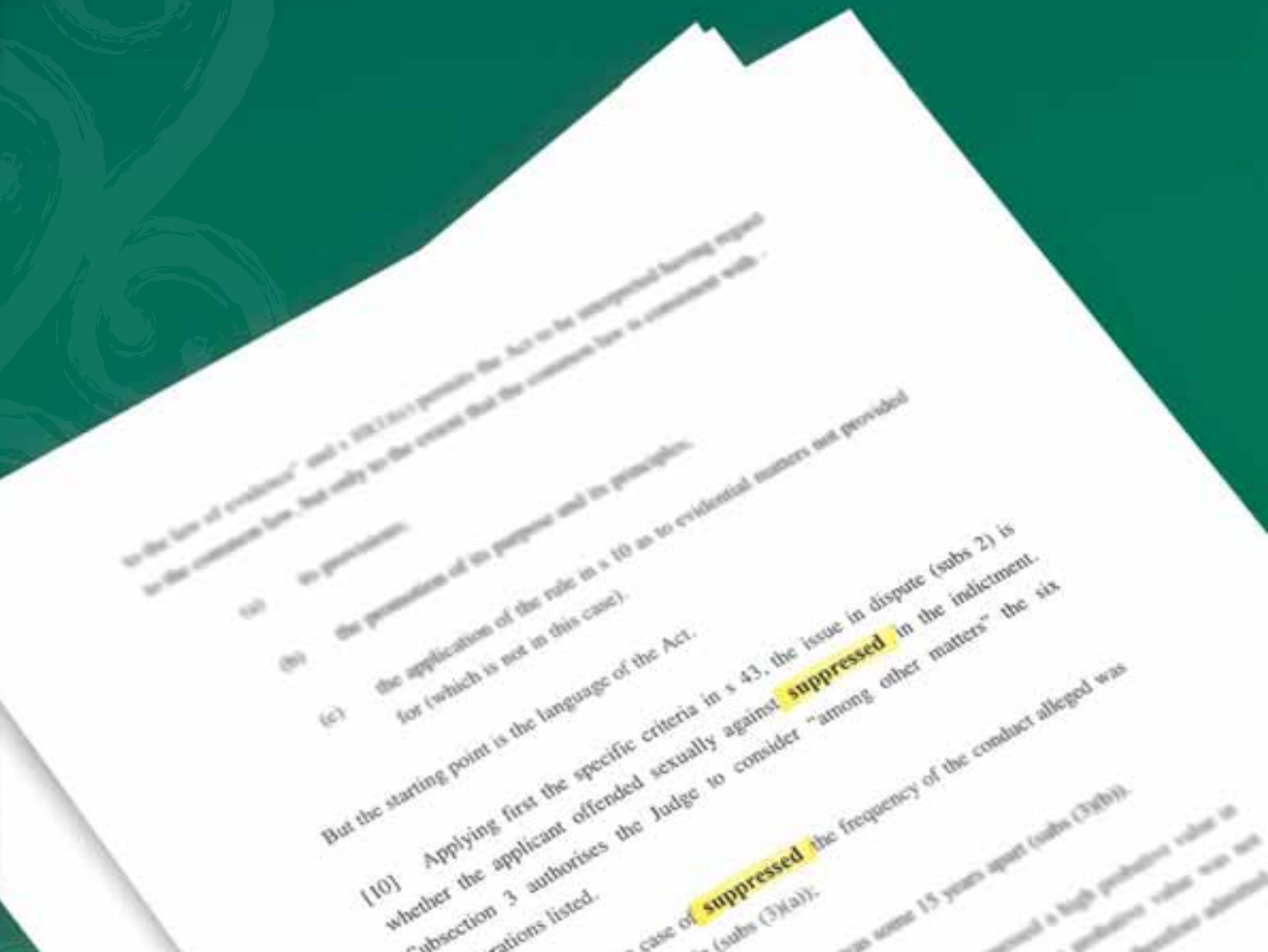




SUPPRESSING NAMES AND EVIDENCE



to the law of evidence" and s 10(2)(a) provides the Act to be interpreted having regard to the common law, but only to the extent that the common law is consistent with...

- (a) its purpose;
- (b) the presumption of its purpose and its principles;
- (c) the application of the rule in s 43 as to evidential matters not provided for (which is not in this case).

But the starting point is the language of the Act.

[10] Applying first the specific criteria in s 43, the issue in dispute (subs 2) is whether the applicant offended sexually against **suppressed** in the indictment. Subsection 3 authorises the Judge to consider "among other matters" the six variations listed.

... case of **suppressed** the frequency of the conduct alleged was ... (subs (3)(a)). ... some 15 years apart (subs (3)(b)). ... a high probability value in ... value was ...



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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The Hon Simon Power
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

22 October 2009

Dear Minister

NZLC R109 – SUPPRESSING NAMES AND EVIDENCE

I am pleased to submit to you Law Commission Report 109, Suppressing Names and Evidence, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Geoffrey Palmer', with a horizontal line underneath.

Geoffrey Palmer

President

FOREWORD

The courts are part of the New Zealand system of government. They administer justice on behalf of the public. Public access to the courts is an essential element of our justice system. The public administration of justice must be subject to public scrutiny. That scrutiny is made possible by the public being able to attend court, and by the media being able to report what happens in the court room.

In relation to our courts, it is important that the principles of open justice and freedom of expression are strongly protected by the law. But the law must also protect the administration of justice and the right to a fair trial.

Striking the balance between these competing demands is not an easy task. The criteria governing decisions to suppress names or evidence must be sufficiently precise to ensure that the values of free speech and open justice are consistently given the emphasis required. But they also need to allow judges enough discretion to take account of the wide range of interests that might impinge on a decision: of victims, witnesses, the accused and the community.

It has been a challenge to arrive at a set of recommendations that achieve this objective. Ultimately, our recommendations have been shaped by our clear view, supported by the majority of submitters, that suppression is currently granted inconsistently and sometimes too readily, and that the grounds for it need to be clarified and tightened.



Geoffrey Palmer
President

ACKNOWLEDGEMENTS We received many helpful submissions in response to the matters raised in Issues Paper 13. We are grateful to the following for taking the time to comment:

Rt Hon Dame Sian Elias, Chief Justice of New Zealand

Rt Hon Justice Blanchard

Hon Justice Baragwanath

Hon Justice Randerson, Chief High Court Judge

Judge David Harvey

Victim Support

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Jock Anderson, NZ Truth Weekly

Ursula Cheer, Associate Professor of Law, University of Canterbury

Sensible Sentencing Trust, Nelson Branch

Judy Ashton

Anne Hunt

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Police Legal Section, New Zealand Police

Tania Thomas, Deputy Health and Disability Commissioner

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Fairfax Media

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Criminal Law Committee of the New Zealand Law Society.

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The Commissioners responsible for this project were Warren Young and Val Sim. The legal and policy adviser was Rachel Hayward.

Suppressing names and evidence

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Recommendations

- CHAPTER 1
- R1 The provisions of section 138 – 141 of the Criminal Justice Act 1985 should be repealed and replaced by new provisions to be included in the Criminal Procedure Bill.
- R2 The starting point for considering publication of evidence and names should be a presumption of open justice.
-
- CHAPTER 2
- R3 The court should have the power to make an order for the suppression of evidence or submissions where the court is satisfied that:
- (a) the interests of the security or defence of New Zealand so require;
 - (b) there is a real risk of prejudice to a fair trial;
 - (c) the order is necessary to avoid undue hardship to victims;
 - (d) publication would endanger the safety of any person; or
 - (e) publication would be likely to prejudice the interests of the maintenance of the law, including the prevention, investigation and detection of offences.
- R4 Section 375A(4) and (5) of the Crimes Act 1961 and section 185E of the Summary Proceedings Act 1957 should be repealed.
-
- CHAPTER 3
- R5 The courts should have the power to make an order prohibiting publication of the name, address, or occupation of a person accused or convicted of an offence, or any particulars likely to lead to that person’s identification, on any of the following grounds:
- (a) where there is a real risk of prejudice to a fair trial;
 - (b) to prevent undue hardship to victims;
 - (c) to prevent extreme hardship to the accused and/or persons connected with the accused;
 - (d) where publication would endanger the safety of any person;
 - (e) where publication would identify another person whose name is suppressed by order or by law;
 - (f) where publication would be likely to prejudice the interests of the maintenance of the law, including the prevention, investigation and detection of offences;
 - (g) where publication would cast suspicion on other people that may result in undue hardship.
- R6 Where a person is accused or convicted of offences under section 130 or 131 of the Crimes Act 1961 (incest or sexual conduct with a dependent family member), the name and identifying particulars of the person accused or convicted of the offence should be automatically suppressed, to prevent the victim being identified.

The victim should be able to apply to the court for publication of the offender's name, and the court must make such an order if the victim is 16 or over, and the court is satisfied that he or she understands the nature and effect of the decision.

- R7 On first appearance, an accused should be entitled to an interim order for name suppression if he or she advances an arguable case for name suppression. The order should expire at the next appearance, and should not be renewed unless evidence supporting the grounds is produced.

CHAPTER 4

- R8 The provisions of section 139 of the Criminal Justice Act 1985 allowing automatic suppression of the names and identifying particulars of victims of specified sex offences should be carried forward into the new legislation.
- R9 The court should have the power to make an order preventing publication of the name, address or occupation of a victim, or any particulars likely to lead to that person's identification, where publication:
- (a) would endanger the safety of any person; or
 - (b) would result in undue hardship to the victim.
- R10 The court should have the power to make an order preventing publication of the name, address or occupation of a witness, or any particulars likely to lead to that person's identification, where publication:
- (a) would endanger the safety of any person; or
 - (b) would cause undue hardship to the witness.
- R11 There should not be an automatic prohibition on the publication of the names and identifying particulars of child witnesses in criminal proceedings. Section 139A of the Criminal Justice Act 1985 should be repealed and not replaced.
- R12 The court should have the power to make an order preventing publication of the identity of persons connected with the accused or the proceedings where publication would otherwise result in undue hardship to that person, whether or not the name of the accused is suppressed.

CHAPTER 5

- R13 The court should have the power to make an order excluding from a criminal proceeding any persons other than the informant, any police employee, the defendant, any counsel engaged in the proceedings and any officer of the court, on any of the following grounds:
- (a) where the court is satisfied that the order is necessary to prevent undue disruption to the conduct of proceedings;
 - (b) on the grounds presently set out in section 375A(1) – (3) of the Crimes Act 1961;
 - (c) where the court is satisfied that:
 - the security or defence of New Zealand so requires; or
 - the order is necessary to avoid a real risk of prejudice to a fair trial; or
 - the order is necessary to avoid endangering the safety of any person; or
 - the maintenance of the law, including the prevention, investigation and detection of offences so requires;

AND the court is satisfied that an order for suppression of name or evidence alone is not sufficient to offset the risk identified.

- R14 Except where the interests of security or defence so require, the power set out in Recommendation 13 should not be exercised so as to exclude members of the media who are subject to a code of ethics and the complaints procedure of the Broadcasting Standards Authority or the Press Council, or such other persons reporting on the proceedings as permitted by the court.
- R15 The court should retain a limited power to discuss in chambers with counsel matters relating to the performance of counsel arising in the course of proceedings.
- R16 Where an order is made excluding persons from the court, the announcement of the verdict or decision and the passing of sentence must still take place in public.
- R17 The terms of the Bail Act 2000 should be recast, to make it clear that in the absence of a court order to the contrary, the media may only report the following matters:
- (a) the identity of the defendant applying for bail;
 - (b) the decision of the court on the application;
 - (c) the conditions of bail, if bail is granted.
- Unless a judge orders otherwise, all other matters dealt with at a bail hearing should be suppressed until the conclusion of the trial (namely the end of the appeal period, or the disposition of any appeal).

CHAPTER 6

- R18 Section 46A of the Summary Proceedings Act 1957 should be amended to remove the power of a registrar to make (rather than continue) an order for suppression of name.
- R19 The existing ouster of the inherent jurisdiction in relation to the power to close the court should be continued.
- R20 There should be a statutory requirement that reasons must be given for the grant or dismissal of a suppression order. However, if the court is satisfied that exceptional circumstances so require, it should have the power to decline to state in public any or all of the facts, reasons, or other considerations that it has taken into account in reaching its decision or verdict, or in determining sentence.
- R21 The date on which an interim order for suppression will terminate must be specified in the interim order.
- R22 Court registrars should have a power to continue an interim order for suppression until the date on which the defendant next appears before a judge.
- R23 Members of the media who are subject to a code of ethics and the complaints procedure of the Broadcasting Standards Authority or the Press Council should have standing to appeal against a decision to make or refuse a suppression order, or a decision varying, revoking or reviewing a suppression order.
- R24 The development of a national register of suppression orders should be advanced as a matter of high priority.

R25 The same legislative right of review should apply to the courts' powers to review orders for the suppression of name and evidence.

CHAPTER 7

R26 Where an Internet service provider or content host becomes aware that they are carrying or hosting information that they know is in breach of a suppression order, it should be an offence for them to fail to remove the information or to fail to block access to it as soon as reasonably practicable.

R27 The provisions of section 141 of the Criminal Justice Act 1985 should be carried forward into the new legislation.

CHAPTER 8

R28 Section 138(8) of the Criminal Justice Act 1985 should be repealed and not replaced.

R29 Sections 206(a) of the Summary Proceedings Act 1957 and section 401(1)(a) of the Crimes Act 1961 should be replaced by a provision in the new Criminal Procedure Bill, drafted in terms of section 206(a), rather than section 401(1)(a).

R30 Breaches of suppression orders should 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 with total absence of fault.

R31 Where a name is suppressed, it should be unlawful to publish that name, or any particulars that are likely (either alone or in conjunction with other information already in the public domain) to lead to the person's identification.

R32 The penalties for breaches of suppression orders should be increased to the level proposed in clause 171 of the Search and Surveillance Bill 2008.

R33 Suppression should not follow automatically on completion of diversion.

R34 Section 36(1B) of the Summary Proceedings Act 1957 should be repealed.

R35 Offences under section 56 to 62 of the Land Transport Act 1998 should not be treated differently in name suppression terms than other offences.

Chapter 1

Introduction

OPEN JUSTICE AND FREEDOM OF EXPRESSION

- 1.1 The principle of open justice and the right to freedom of expression have been described as rights that go to the very existence and health of our political and legal institutions.¹
- 1.2 Open justice provides critical safeguards against injustice in the operation of the criminal justice process.² The principle dictates that there should be no restriction on publication of information about a court case except in very special circumstances,³ or for compelling reasons.⁴
- 1.3 The right to freedom of expression set out in section 14 of the New Zealand Bill of Rights Act 1990 is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.⁵
- 1.4 Sections 138 to 141 of the Criminal Justice Act 1985 set out statutory powers of the courts to close the court and restrict publication of information in criminal cases. These exceptions are not intended to diminish the importance of open justice: the courts have emphasised that in exercising the discretions set out in the Act, the starting point is the importance of freedom of expression and open judicial proceedings.⁶
- 1.5 The research and consultation undertaken in the course of this review indicates that there are some inconsistencies in the application of the law relating to the suppression of name and evidence. There are also some areas where greater certainty and clarity are required to avoid the provisions of the Criminal Justice Act 1985 having the effect of eroding open justice, and unreasonably impinging on the right to freedom of expression. At present, there is at least a perception that the principle of open justice is departed from too readily in our criminal courts, without clearly articulated reasons. Even the existence of this perception undermines the principle of open justice and risks jeopardising public confidence in the courts.

1 *Re Victim X* [2003] 3 NZLR 220, para 51, per Hammond J. For further discussion, see New Zealand Law Commission *Suppressing Names and Evidence* (NZLC IP 13, Wellington, 2008), paras 1.1 – 1.5.

2 *R v Mahanga* [2001] 1 NZLR 641, para 18.

3 *Ibid*, endorsed by the Court of Appeal in *Re Victim X* [2003] 3 NZLR 230, para 36, per Keith J.

4 *Re Victim X*, above n 3, para 37, per Keith J.

5 New Zealand Bill of Rights Act 1990, s 5.

6 *R v Mahanga* above n 2 para 20.

- 1.6 This review of the 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. The wider project will result in a new Criminal Procedure Bill. We envisage that the Bill will repeal and replace the provisions set out in sections 138 to 141 of the Criminal Justice Act 1985. The recommendations made in this report relate to a new framework to be contained in the Bill for the suppression of name and evidence, and closure of the court.
- 1.7 We have concluded that a number of changes are required to the existing framework to place greater emphasis on the principle of open justice and to ensure that the grounds on which it may be departed from are transparent, explicit and consistently applied.
- 1.8 The most significant change we recommend is in the area of name suppression. We do not consider that the present broad discretion set out in section 140 provides enough guidance to adequately protect open justice and ensure that any order satisfies the requirements of section 5 of the New Zealand Bill of Rights Act 1990. Although the leading cases set a high threshold for name suppression, this is not always applied in the lower courts. We recommend a clearer test for name suppression, with specified grounds.
- 1.9 We also make a number of other recommendations where the law requires updating or rationalising to ensure consistency with other legislation.
- 1.10 In the Issues Paper, we asked whether the presumption of open justice was the appropriate starting point when considering publication or suppression of evidence, the names of accused and convicted persons, and the names of witnesses and victims. Submissions in reply were strongly in favour of this starting point.

RECOMMENDATION

- R1 The provisions of section 138 – 141 of the Criminal Justice Act 1985 should be repealed and replaced by new provisions to be included in the Criminal Procedure Bill.

RECOMMENDATION

- R2 The starting point for considering publication of evidence and names should be a presumption of open justice.

Suppression statistics

- 1.11 During the review we often heard the view expressed that suppression orders have been used more frequently in recent years, especially at District Court level. We therefore asked the Ministry of Justice to provide details of the number of interim and final orders made suppressing names and evidence in the District Courts and High Court each calendar year since 2004 (which was the first year for which full details are available on the Courts Management System).

- 1.12 The detailed data provided by the Ministry of Justice neither proves nor disproves perceptions about increases in the use of suppression orders. The figures set out the number of suppression orders made by direction type, that is, according to whether the direction suppressed evidence or name, on a final or interim basis. The figures also identify the number of cases in which directions of each type were made. This means there is some duplication. For example, if orders suppressing both evidence and name were made in one single case, that case will be counted twice in the number of cases in which directions were made.
- 1.13 There is also duplication in relation to interim orders. A new direction is counted each time a suppression order is continued by the court, as it is given a new direction identification number. Thus if an interim direction is renewed three times by the court, it will appear in the figures as three directions.
- 1.14 As a consequence, the best available information is simply the aggregate number of cases subject to one or more suppression orders of any type. Those numbers for the past five years are set out in the table below:

NUMBER OF CASES SUBJECT TO ONE OR MORE SUPPRESSION ORDER(S) FOR THE YEARS 2004 TO 2008					
Year	2004	2005	2006	2007	2008
District Court	1667	1830	1823	1749	2038
High Court	170	164	188	199	140

- 1.15 At first blush, it does appear that there has been an increase in suppression orders made in the District Court. However, there has also been an increase in workload in the District Court, and therefore some change would be expected. As a proportion, the number of cases in which suppression orders were made in the District Court in each year shown remained constant at about one per 100 cases disposed of in the District Court. This is not a perfect measure, but in the absence of detailed information about the nature of the cases in which orders were made, it does suggest that increased caseload is likely to explain most if not all of the growth.
- 1.16 While suppression statistics in New Zealand appear to have been consistent in the last four years, name suppression for people accused or convicted of a crime is more readily available here than in comparable common law jurisdictions like the United Kingdom and certain states of Australia, where generally name suppression for adult offenders is rare. We examine those provisions in more detail in Chapter 3.

Chapter 2

Suppression of evidence

GROUNDS FOR SUPPRESSION OF EVIDENCE

- 2.1 The current grounds for suppression of evidence are set out in section 138(2) of the Criminal Justice Act 1985. 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 if it considers such an order is required in the interests of:
- (a) justice;
 - (b) public morality;
 - (c) the reputation of any victim of any alleged sexual offence;
 - (d) the reputation of any victim of any alleged offence of extortion; or
 - (e) the security or defence of New Zealand.
- 2.2 In Issues Paper 13, we discussed whether these were still appropriate grounds for the suppression of evidence, and whether there are other grounds that should be added. Each ground must be capable of justifying rebutting the presumption of open justice in a particular case, and it must be a reasonable and demonstrably justified limit on the section 14 right to freedom of expression.
- 2.3 We have concluded that some change is required to the existing grounds for suppression of evidence. We discuss the current grounds first, and then turn to consider what other grounds might be appropriate.

Current grounds for suppressing evidence

Public morality

- 2.4 In Issues Paper 13, we argued that the present power to suppress evidence for reasons of public morality is archaic and paternalistic, and should no longer be a ground for the suppression of evidence or submissions. There was widespread agreement from submitters that this ground was no longer appropriate.

Reputation of victims of sexual offences and extortion

- 2.5 In the Issues Paper, we suggested that it may no longer be appropriate for the court to have a power to suppress evidence on the grounds that it is required in the interests of the reputation of victims of sexual offences or extortion. We emphasise that our discussion here relates to the suppression of *evidence*: we will return to the issue of name suppression for victims in Chapter 4.
- 2.6 A number of submitters disagreed strongly with the suggestion that these grounds were no longer appropriate in their current formulation.
- 2.7 In relation to the interests of the reputation of victims of extortion, the rationale given for suppression is often that experience shows there may be grave difficulty in getting complainants to come forward unless they are given protection. As Jacob Jaconelli puts it in his work *Open Justice*:⁷
- By the very fact of making the threats in question, the alleged blackmailer has shown that the victim places the highest possible value on retaining his secret.
- 2.8 We acknowledge that there are cases where the prospect of certain evidence being made public may discourage victims from coming forward. This response may be much more likely in relation to offences of extortion or sexual offences (although there may well be situations in which victims of other offences will also be deterred by the idea of publicity). However we take issue with the way the present power under section 138(2) singles out the interests of the *reputation* of the victim.
- 2.9 This phrasing is particularly problematic in the case of sexual offence victims. Suppressing evidence in such cases on the grounds of the victim's reputation suggests either that being a victim of a sexual offence reflects badly on the reputation of the victim, or that victims of sexual offences are likely to have bad reputations. The same concern arises in relation to victims of extortion: suppressing evidence in the interests of the victim's reputation may suggest that there is truth to the allegations made by the blackmailer.
- 2.10 Victims of sexual offences or extortion may require protection by way of orders suppressing evidence. However, rather than making reference to the victim's reputation, we consider that their interests can be protected by a more general and more neutral ground, that the publication of the evidence would cause undue hardship to the victim. This would also allow the court to make orders suppressing evidence where victims of other offences would suffer undue hardship if that evidence were made public.

⁷ Jacob Jaconelli *Open Justice: A Critique of the Public Trial* (Oxford University Press, Oxford, 2002) 175.

- 2.11 In her submission, Associate Professor Ursula Cheer suggested that a ground of undue hardship would be adequate, but asked whether in reality such a change would give less protection to victims of blackmail or sexual offences, given that they would no longer be specified and therefore at the forefront of judges' minds. However, police prosecutors will be well aware of the sensitivities that may arise in extortion or sexual offence cases, and will almost certainly request suppression of evidence where those issues arise. We suggest that the Police Prosecution Service consider developing guidelines for prosecutors to this effect.
- 2.12 We recommend that the grounds for suppressing evidence in the interests of the reputation of any victim of any alleged sexual offence or offence of extortion be replaced by a ground of undue hardship to victims. This ground is discussed further (in relation to suppression of the accused's name) in Chapter 3.

Security or defence of New Zealand

- 2.13 We consider that the public interest in protecting the security or defence of New Zealand is high and that the availability of this exception to the principle of open justice is plainly justified. Submitters generally agreed that this was an appropriate ground for suppression of evidence. There is no evidence of this ground being over-used in the past, and sufficient safeguards are provided by rights of appeal and review. We recommend that this ground be retained.

Interests of justice

- 2.14 At present, section 138(2) provides that the court may make an order forbidding publication in any report or account of the whole or any part of the evidence adduced where the court is of the opinion that the "interests of justice" so require. This phrase has been held to refer to or include the administration of justice, as well as any particular interest which may require protection.⁸ It may also include issues of fairness to the accused.⁹ It is often used to ensure the protection of the right to a fair trial. Most submitters did not express strong views on the question of whether an interests of justice test should remain.
- 2.15 The interests of justice test has the advantage of flexibility, and provides a residual ground to cover unforeseen cases. Some argue that it is particularly useful in relation to section 138(2), where the court's inherent jurisdiction has been excluded. In particular, in a joint submission the Chief Justice, the Acting President of the Court of Appeal and the Chief High Court Judge submitted that the broad grounds upon which the inherent jurisdiction is exercised, namely the interests of justice and fair trial, must remain available.
- 2.16 On the other hand, the interests of justice test has the disadvantage of being inherently vague and indeterminate. It is capable of being interpreted to mean simple "fairness", in which case it does little more than give the court an open-ended discretion.

8 *Police v O'Connor* [1992] 1 NZLR 87, 96.

9 *R v Burns (Travis)* [2002] 1 NZLR 387, 407.

- 2.17 We consider that as far as possible, the legislation should identify the particular interests that may warrant the exercise of the courts' powers to suppress evidence. We believe it is possible to specify the grounds with sufficient particularity as to make a broad interests of justice test unnecessary.

Proposed new grounds for suppressing evidence

- 2.18 In the Issues Paper, we set out a number of additional grounds for the suppression of evidence that we suggested should be identified in legislation. These grounds articulate matters that commonly fall into the interests of justice test at present. They were:
- (a) to avoid a real risk of prejudice to a fair trial;
 - (b) to avoid undue hardship to victims;
 - (c) where publication would endanger the safety of any person;
 - (d) where publication would be likely to prejudice the interests of the maintenance of the law, including the prevention, investigation and detection of offences.

Right to a fair trial

- 2.19 We consider that the protection of a fair trial should be set out as a specific legislative ground for the suppression of evidence. There was general support for this ground in submissions, but submitters differed on the appropriate threshold of risk required before the court has the power to make an order. Some suggested it should be a real risk (which is the existing test applied by the courts), others that the risk should be high or extreme.
- 2.20 In our view, requiring a high or extreme risk of prejudice to a fair trial sets the bar too high. While there are compelling reasons for a powerful presumption of open justice, the fundamental aim of the justice system is to ensure that justice is done. We recommend that the test for suppression of evidence should be whether there is a real risk of prejudice to a fair trial.

Undue hardship to victims

- 2.21 Most submitters said that there should be an express power to suppress evidence to avoid undue hardship to a victim, although a few submitters thought that a higher threshold was required. The courts have interpreted "undue" hardship to mean: serious hardship;¹⁰ excessive or greater hardship than the circumstances warrant;¹¹ or (in the case of a forfeiture order) as something more than the ordinary hardship stemming from the operation of the order.¹² This contrasts with extreme hardship, which requires a very high level of hardship.
- 2.22 As already discussed, giving the courts a power to suppress evidence on the grounds of undue hardship to victims is in our view more appropriate than singling out the victims of extortion and sexual offences for protection on grounds of reputation. Undue hardship to victims would still allow protection for victims of those offences, but would also extend the protection to victims of

10 *R v Wallace* (2001) 18 CRNZ 577 (CA).

11 *Dalton v Auckland City* [1971] NZLR 548, 549 – 50.

12 *Lyllall v Solicitor-General* [1997] 2 NZLR 641, 646.

other offences where undue hardship was made out. We recommend that undue hardship should be a ground on which the court may exercise the power to suppress evidence or submissions.

- 2.23 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 that Act. This would ensure an appropriate balance was struck between freedom of expression and the interests of victims.
- 2.24 The definition of victim in this context 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.
- 2.25 Section 12 of the Victims’ Rights Act 2002 sets out the various matters about which a victim must, as soon as practicable, be given information by investigating authorities or, as the case requires, by members of court staff, or the prosecutor. This list could be amended to include a requirement that the victim be informed that undue hardship to victims is a ground for suppression of evidence. The Ministry of Justice is currently reviewing the Victims’ Rights Act 2002, and will consider whether an amendment to section 12 would be appropriate. Guidelines to police prosecutors could also advise prosecutors to consult the victim about the availability of this ground for suppression of evidence where it appears it may be at issue.

Section 375A(4) Crimes Act 1961

- 2.26 In the Issues Paper, we sought views as to whether the formulation of “undue hardship” should 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 that the interests of the complainant so require. There was support for this approach from submitters. We recommend that section 375A(4) of the Crimes Act 1961 be repealed. Section 185E(1) of the Summary Proceedings Act 1957 provides the same protection in relation to standard committal and committal hearings, and should also be repealed.
- 2.27 This does not dilute the protection available for the victim in sexual cases. If the test set out in section 375A(4) and section 185E(1) is interpreted consistently with the rights and freedoms set out in the New Zealand Bill of Rights Act 1990, as section 6 of that Act requires, it should effectively amount to a requirement of undue hardship in any event.
- 2.28 Section 375A(5) provides that the breach, evasion or attempted evasion of an order under subsection (4) may be dealt with as contempt of court. If section 375A(4) is repealed, subsection (5) should also be repealed. Similarly, section 185E(2) of the Summary Proceedings Act 1957 contains the penalty provisions for a breach of section 185E(1), and should also be repealed.

The safety of any person

- 2.29 There was widespread agreement among submitters that it would be appropriate to suppress evidence where publication would endanger the safety of any person. We recommend that this be a ground for the suppression of evidence.

The maintenance of the law

- 2.30 In the Issues Paper we asked whether the maintenance of the law should be a ground for the suppression of evidence. This would be consistent with existing grounds for withholding information under both the Official Information Act 1982 and the Criminal Disclosure Act 2008. These statutes provide grounds for withholding information if disclosure is likely to prejudice the maintenance of the law, including the prevention, investigation and detection of offences.¹³
- 2.31 Although the context is different, decisions of the Ombudsman in relation to section 6(c) of the Official Information Act 1982 provide examples of how such a ground operates in practice. Successive Ombudsmen have accepted that statutory law enforcement agencies rely heavily on the public for assistance, and that much of this information is supplied on a confidential basis. Disclosure of the identity of an informant or any information which may lead to the identification of an informant has been found to be likely to prejudice the maintenance of the law,¹⁴ as has disclosure of information that may prejudice an ongoing investigation. The word “likely” has been interpreted by the courts in this context to mean there is a real and substantial risk to a protected interest – a risk that might well eventuate.¹⁵
- 2.32 Most submitters who responded to this question agreed with the proposal to include maintenance of the law as a ground for the suppression of evidence. Some expressed doubts about how such a rule would operate in practice, particularly whether it would be used by enforcement agencies to suppress prosecution evidence such as standard operating procedures and covert intelligence tactics. However, if disclosure of evidence of covert intelligence tactics in a particular case is likely to prejudice the future prevention, investigation and detection of offences, it would be appropriate to suppress that evidence.
- 2.33 Some submitters also pointed out that information that might be suppressed under this ground, such as details of the manufacture of drugs or explosives, is readily available on the Internet and in libraries. If that is the case, it seems unlikely that the court would make an order for suppression, as the order would be futile.

13 Criminal Disclosure Act 2008, s 16(1)(a); Official Information Act 1982, s 6(c). Section 6(c) of the Official Information Act 1982 also includes the right to a fair trial under this ground.

14 Case Notes [W45324] Office of the Ombudsmen 14th Compendium [pp. 93-95] 2007.

15 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 391 (CA).

- 2.34 We recommend that the courts should have a power to suppress evidence where publication would be likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences.

RECOMMENDATIONS: SUPPRESSION OF EVIDENCE

- R3 The court should have the power to make an order for the suppression of evidence or submissions where the court is satisfied that:
- (a) the interests of the security or defence of New Zealand so require;
 - (b) there is a real risk of prejudice to a fair trial;
 - (c) the order is necessary to avoid undue hardship to victims;
 - (d) publication would endanger the safety of any person; or
 - (e) publication would be likely to prejudice the interests of the maintenance of the law, including the prevention, investigation and detection of offences.

RECOMMENDATION

- R4 Sections 375A(4) and (5) of the Crimes Act 1961 and section 185E of the Summary Proceedings Act 1957 should be repealed.

Breadth of orders to suppress evidence

- 2.35 In the Issues Paper, we asked whether the courts should have power to make “blanket suppression orders” suppressing the publication of all details of a case. Most submitters were strongly opposed to any such orders, and said they should be prohibited by statute. The Criminal Law Committee of the New Zealand Law Society commented that it was difficult to imagine circumstances in which a complete blackout of publicity would be justified, except perhaps in extreme circumstances, for example involving national or international security.
- 2.36 Like the Criminal Law Committee, we find it hard to envisage circumstances justifying a blanket suppression order. However we do not consider that a legislative prohibition on such orders is required if the recommendations made in this report are enacted. The grounds on which suppression orders may be made will be specified in the legislation, and the court will have to give reasons for the grant of the suppression order.

Chapter 3

Suppression of name or identifying particulars of accused or convicted persons

- INTRODUCTION 3.1 Section 140(1) of the Criminal Justice Act 1985 gives the courts a broad discretion to prohibit publication of names or particulars of the accused or any other person connected with the proceedings. The section is presently used to suppress the name of accused and convicted persons, victims, and family and friends of the accused. In this chapter, we are concerned only with name suppression of accused and convicted persons. We return to consider the suppression of names of victims, witnesses and others in Chapter 4.
- 3.2 The strongest concerns in submissions and consultation were expressed in relation to orders made under section 140 suppressing names of accused or convicted persons. As two journalists noted in their submission,¹⁶ the cases that cause tension between the media and the courts should not be over-stated, even if they do cause some heat at the time. They often involve the suppression of names of prominent people or the suppression of information when those involved are perceived to have been treated differently or in some favoured light. But nonetheless, frustration about inconsistency in rulings on name suppression applications, particularly in the lower courts, was a recurrent theme in submissions and consultation.
- 3.3 In *Lewis v Wilson & Horton*,¹⁷ the Court of Appeal said that the balance must come down clearly in favour of suppression before the prima facie presumption in favour of open reporting can be overcome. The New Zealand Herald submitted that it would have no problem with suppression if the law were consistently applied according to the principles laid down by the Court of Appeal in *Lewis v Wilson & Horton*, but argued that these principles are often ignored in the lower courts.

16 Submission from Deborah Morris and Clive Lind dated 27 February 2009.

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

- 3.4 Particular concerns were raised in relation to the criminal “list courts”. These are the courts in which defendants first appear. At that appearance, the defendant may be asked to make an election as to whether s/he wants to be tried by a judge or a jury (if applicable) or to enter a plea. Usually, the case is adjourned, to allow administrative matters to be dealt with, such as the granting of legal aid and assigning counsel. The court is called the list court because at each sitting, the judge will have a long list of cases to deal with – sometimes as many as 100.
- 3.5 A number of submitters, including lawyers and members of the media, suggested that name suppression is granted in the list courts almost as a matter of course. The pressures on the busy list courts have been described in previous Law Commission reports,¹⁸ and those pressures can raise particular issues for name suppression cases. The accused may not have had time to obtain legal advice. Arguments against suppression may not be presented, as the police position on name suppression will often be neutral, and members of the media will not always be in attendance, or have sufficient information to be in a position to respond to an application for suppression. Even if arguments are made, the judicial officer may not have time to consider them in depth. Such factors may lead to the judicial officer choosing to preserve the position by granting interim name suppression, which is then carried on from one hearing to the next.
- 3.6 We have concluded that there is a need for greater specificity of the statutory grounds on which name suppression may be granted. These grounds should reflect the high threshold required by the leading cases, to avoid dilution of the strong presumption in favour of open justice, and to provide adequate protection for freedom of expression. Setting out the grounds for name suppression in legislation will provide greater certainty for applicants and for those opposing applications, and should help improve consistency of decision making.
- 3.7 We also propose that there should be a special process for applications for interim name suppression at first appearance. This will allow parties the opportunity to obtain legal advice and gather supporting evidence to make an application for name suppression, but the interim order will not roll on indefinitely. We return to this issue at paragraph 3.68.

NAME SUPPRESSION IN OTHER JURISDICTIONS

- 3.8 Questions were asked in response to the Issues Paper about the difference between the New Zealand position in relation to name suppression and that in the United Kingdom and Australia. Name suppression is generally more readily available here to adults accused or convicted of crimes than in either of those jurisdictions. Before considering the existing and proposed grounds for name suppression in New Zealand, we turn briefly to consider the law in the United Kingdom and Australia.¹⁹

¹⁸ New Zealand Law Commission *Seeking Solutions: Options for Change to the New Zealand Court System* (NZLC PP52, Wellington, 2002); New Zealand Law Commission *Criminal Pre-trial Processes: Justice Through Efficiency* (NZLC R89, Wellington, 2005) 35.

¹⁹ This does not include discussion of name suppression for children or young people accused or convicted of criminal offences.

United Kingdom

- 3.9 In the United Kingdom, name suppression for adults accused or convicted of a crime is relatively rare. As a general rule, open justice requires that court proceedings should be held in open court to which the press and public are admitted, and all evidence communicated to the court in criminal cases should be communicated publicly. Nothing should be done to discourage the publication of fair and accurate reports of proceedings. However, the courts have held that it may sometimes be necessary to abrogate the principle of open justice where the application of the general rule in its entirety would frustrate or render impracticable the administration of justice.²⁰
- 3.10 Where the court has a common law power to depart from the open justice principle and suppress a name or other information, section 11 of the Contempt of Court Act 1981 empowers it to give such directions prohibiting the publication of the name or other matter in connection with the proceedings as appear to be necessary for the purpose for which it was withheld.²¹ However, the courts have made it clear that section 11 orders may not be imposed for the comfort and feelings of defendants: the issue is whether requiring open justice would frustrate or render impracticable the administration of justice.²²
- 3.11 The courts also have a statutory power to make postponement orders under section 4(2) of the Contempt of Court Act 1981. The court may order that the publication of a report, in whole or in part, be postponed for a period of time sufficient to avoid a substantial risk to the administration of justice in the proceedings, or other proceedings which are pending or imminent.²³
- 3.12 Applications for postponement orders in criminal trials are usually made:²⁴
- (a) where there are multiple charges and/or defendants, requiring a series of trials;
 - (b) where legal argument takes place in the absence of the jury to avoid any risk of prejudice.

20 *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 450, per Lord Diplock.

21 This section does not confer a new power to withhold a name or other matter – the court must have an existing common law or statutory power to depart from the open justice principle – but the section grants a new power to give directions to prohibit publication.

22 *R v Evesham Justices, ex parte McDonagh* [1988] 2 WLR 227, 234. The defendant to a minor road traffic offence was a former member of Parliament whose home address was not given orally to the court because he said he feared harassment from his ex-wife. The magistrates made an order under section 11 forbidding its publication. The Divisional Court held that while evidence could be communicated to the court in writing if the proper administration of justice demanded it, there were no good reasons in the present case. The order was quashed. In *R v Dover Justices, ex parte Dover District Council* (1992) 156 JP 433, “exceptional circumstances” justifying restrictions on publicity did not include the fact that publication might have dire economic consequences leading to the closure of the defendant’s business.

23 Section 4(2) of the Contempt of Court Act 1981. See generally Halsbury’s Laws of England, *Contempt of Court* Vol 9(1) Reissue, para 428.

24 G Robertson & A Nicol, *Robertson & Nicol on Media Law*, (4 ed, Sweet & Maxwell, London 2002) 458 – 459.

- 3.13 The media has a formal right of appeal against the imposition of a postponement order.²⁵
- 3.14 There are statutory restrictions on publication in relation to committal proceedings. Sections 6 and 8 of the Magistrates' Courts Act 1980 limit the publication of details of committal proceedings. However, the details that *may* be published include the names, addresses and occupations of the parties and witnesses, and the offences or a summary of the offences.
- 3.15 In the case of certain sexual offences, no matter likely to lead to the identification of the victim of the offence may be published, unless the restriction on reporting is lifted by the court.²⁶ This may lead to the name of the offender being suppressed, if publication would identify the victim.

Australia

- 3.16 The law on suppression orders varies across Australian jurisdictions. There is a limited common law power to prohibit publication, which focuses on the administration of justice.²⁷ Hardship to parties or witnesses is not recognised as a reason for suppression at common law. The common law power is often supplemented by statute in Australian jurisdictions, but the common law principles remain important for interpreting many of the statutory provisions.²⁸

New South Wales

- 3.17 In New South Wales, specific statutory provisions empower a court to close or make non-publication orders in proceedings for sexual offences,²⁹ and proceedings involving children,³⁰ but there is no general statutory power authorising the courts to restrict publication of proceedings where publication may be prejudicial to a trial or to the administration of justice generally,³¹ or to prohibit publication of the name of an accused person in criminal proceedings.

Victoria

- 3.18 In Victoria, there are statutory grounds on which the Supreme Court may close proceedings to the public, or make an order prohibiting the publication of a report of the whole or any part of a proceeding or of any information derived from a proceeding. The two most relevant to name suppression for an accused

25 Criminal Justice Act 1988, s 159.

26 Sexual Offences (Amendment) Act 1992 (UK), ss 1-3.

27 Andrew T Kenyon *Not Seeing Justice Done: Suppression Orders in Australian Law and Practice* (2006) 27 *Adelaide Law Review*, 279, 280.

28 *Ibid.*

29 Criminal Procedure Act 1986 (NSW) ss 291 – 292 – but this applies only to the name of the complainant.

30 For example the Child (Criminal Proceedings) Act 1987 (NSW).

31 New South Wales Law Reform Commission *Contempt by Publication* (DP43, Sydney, 2000) 10.73.

include avoiding prejudice to the administration of justice and protecting the physical safety of any person.³² Similar powers apply in proceedings in the Magistrates' Court.³³

South Australia

- 3.19 In South Australia, legislation provides that a court may make a suppression order forbidding the publication of specified evidence or the name of a party, witness or person alluded to in the course of proceedings before the court, where the court is satisfied that the order should be made:³⁴
- (a) to prevent prejudice to the proper administration of justice; or
 - (b) to prevent undue hardship to an alleged victim of crime or to a witness or potential witness in civil or criminal proceedings who is not a party to those proceedings, or to a child.
- 3.20 Section 69A(2) of the Evidence Act 1929 requires the court, in considering whether to make a suppression order (other than an interim suppression order), to recognise the public interest in open justice and the consequential right of the news media to publish information relating to court proceedings as considerations of substantial weight. The court may only make the order if it is satisfied that the prejudice to the proper administration of justice, or the undue hardship that would occur if the order were not made should be accorded greater weight than those considerations.

Australian Capital Territory

- 3.21 Section 91 of the Evidence (Miscellaneous Provisions) Act 1991 (ACT) gives the Supreme Court and the Magistrates' Court the power to prohibit the publication of the name of a party or a witness if it is desirable in the interests of the administration of justice that the name not be published.

32 Supreme Court Act 1986 (Vic) ss 18 – 19. The full grounds on which the court may close proceedings or prohibit publication of information are where in the opinion of the court it is necessary to do so in order not to: (a) endanger the national or international security of Australia; or (b) prejudice the administration of justice; or (c) endanger the physical safety of any person; or (d) offend public decency or morality; or (e) cause undue distress or embarrassment to a complainant in proceedings that relates to certain specified sexual offences; or (f) cause undue distress or embarrassment to a witness under examination in a proceeding of any kind relating to a charge for an offence where the conduct constituting the offence consists wholly or partly of taking part, or attempting to take part, in an act of sexual penetration as defined in section 35 of the Crimes Act 1958. In considering whether an order is necessary in order not to prejudice the administration of justice, the courts will consider prejudice not just to the particular proceedings in which the order was made, but whether allowing publication would prejudice the administration of justice in later cases – *Herald and Weekly Times Ltd v The Magistrates' Court of Victoria* [1999] VSC 232 – in the case of blackmail, in making an order in a particular case, persons who later become victims of blackmail will be encouraged to report the incident to authorities. A high level of satisfaction is required as to the existence of the conditions which are “necessary” for the making of a non-publication order – *Herald & Weekly Times Pty Ltd v DPP* [2007] VSC 71, at paras 23 – 24.

33 Magistrates' Court Act 1989 (Vic), s 126.

34 Evidence Act 1929 (SA) s 69A.

Northern Territory

- 3.22 Section 57 of the Evidence Act 1939 (NT) gives the court power to forbid the publication of the name of a party or a witness (or intended party or witness) where it appears to the court that it is desirable to prohibit the publication of the name in the interests of the administration of justice.
- 3.23 Despite the apparent breadth of this provision, in 2000, the New South Wales Law Reform Commission noted that orders for suppression of name or evidence were made infrequently in the Northern Territory. The Department of Public Prosecutions estimated that only six orders were made under section 57(3) of the Act in 1997, and only two in 1998.³⁵

Western Australia

- 3.24 In Western Australia, statutory provisions protect the names of complainants in sexual cases.³⁶ These provisions also prevent publication of the name of an accused if that would identify the complainant.

Queensland

- 3.25 In Queensland, the identification of the complainant and defendant in any report of an examination of witnesses in relation to a prescribed sexual offence, including rape and attempted rape, is prohibited unless the justices order otherwise.³⁷ It is also an offence to reveal the identity of a defendant in a prescribed sexual offence case before the defendant is committed for trial or sentence in that case.³⁸

**GROUNDS FOR
SUPPRESSION
OF NAME OF
ACCUSED OR
CONVICTED
PERSONS**
Starting point

- 3.26 All submitters agreed with the view expressed in the Issues Paper that the starting point in relation to publication of the name or identifying particulars of accused or convicted persons should be a strong presumption in favour of publication.
- 3.27 In the Issues Paper, we noted a number of cases that suggest that the stage of the trial is an important consideration in decisions on suppression orders. The courts have indicated that the personal circumstances of the accused and his or her family may carry different weight at different stages of a trial. For example, it is very rare that the interests of an offender's family will justify suppression after conviction if the offending is serious.³⁹

35 New South Wales Law Reform Commission *Contempt by Publication* above n 31, 331.

36 Evidence Act 1906 (WA) s 36C: ... after a person is accused of a sexual offence no matter likely to lead members of the public to identify the complainant and, in the case of a complainant who is attending a school, no matter likely to lead members of the public to identify the school which the complainant attends, in relation to that accusation shall be published in a written publication available to the public or be broadcast, except by leave of the court which has or may have jurisdiction to try the person accused for that offence.

37 Criminal Law (Sexual Offences) Act 1978 (Qld) s 7.

38 Ibid, s 10.

39 *R v Liddell* [1995] 1 NZLR 538, 544.

- 3.28 In our view, the presumption of openness should apply to all stages of the trial, although it will be at its strongest during the actual hearing. The grounds for name suppression orders should be the same at all stages of the trial, but the extent to which they are available and the weight that will be placed upon them will shift depending on the stage of the proceedings. This is a matter that can be taken into account by the courts without needing to be set out in legislation. For example, what amounts to extreme hardship to the accused justifying name suppression before the trial may not be considered to be extreme hardship after conviction.

Current power to suppress

- 3.29 As noted earlier, section 140 provides a very broad power for the courts to suppress the names of people accused or convicted of offences. In our view, the present power is too broad, and can lead to uncertainty and inconsistency. We recommend that this broad discretion should be reduced, and the grounds on which name suppression may be granted should be set out in legislation.
- 3.30 The New Zealand Herald submitted that codifying the grounds for suppression would lead to a flood of applications requiring full hearings to be properly decided. It suggested that the real challenge was not to codify the grounds, but to ensure that the lower courts consistently apply the standards set down by the Court of Appeal in *Lewis v Wilson & Horton*.
- 3.31 We do not accept that setting out the grounds on which name suppression orders may be made will lead to more applications for name suppression. Section 138 has always set out the grounds on which evidence may be suppressed, without a flood of applications resulting. Specifying the grounds for name suppression will help to reduce inconsistency in the busy lower courts, and ensure that the threshold remains high. The challenge is to ensure that the specified grounds enable the courts to respond to cases in which name suppression is justified.

Proposed grounds for suppression

Fair trial

- 3.32 As noted in the Issues Paper, publication of name is most likely to create a risk of prejudice to a fair trial where an accused faces a number of charges that are being tried separately. We recommend that the risk of prejudice to a fair trial should be a ground for the suppression of name of the accused, and that the threshold should be the same as for the suppression of evidence, namely where there is a real risk.

Hardship to the victim

- 3.33 There will be cases where publication of the name of an offender will cause undue hardship to a victim. Some such cases are presently covered by section 139 of the Criminal Justice Act 1985, which provides for the name of the offender to be automatically suppressed in cases of incest or sexual conduct with a dependent family member, in the interests of protecting the victim. We believe this is a reasonable and demonstrably justified limitation on the right to freedom

of expression set out in section 14 of the New Zealand Bill of Rights Act 1990, and justifies rebutting the presumption of open justice in such cases. We recommend that a similar provision should be included in the new criminal procedure legislation. Section 139 allows the victim to apply to the court for publication of the offender's name, and the court must make such an order if the victim is 16 or over, and the court is satisfied that he or she understands the nature and effect of the decision.

- 3.34 However, there may also be other situations in which publication of the name of the offender would cause undue hardship to the victim. We consider that this would justify limiting the right to freedom of expression, and rebutting the presumption of open justice. Most submitters agreed with this proposed ground, and with the proposed threshold of undue hardship. We recommend accordingly.
- 3.35 As noted in Chapter 2 at paragraph 2.25, a requirement for prosecutors to inform victims about this ground for suppression of the name of the accused could appear in either the Victims' Rights Act 2002, or in prosecution guidelines, or both.

Hardship to the accused

- 3.36 The courts already take matters of hardship to the accused into account in deciding whether to suppress names and identifying particulars of an accused or convicted person. As noted, ordinary hardship will not be enough: the courts have indicated that hardship is an inevitable consequence of offending. But one can imagine cases in which a convicted person may suffer extreme hardship from publication of his or her name, out of all proportion to the public interest in open justice in the particular case, especially if the person suffers from physical or mental ill health. In our view, hardship to the accused should be included as a statutory ground for suppression of name.
- 3.37 What level of hardship should be required? In the Issues Paper we asked for comments on whether the appropriate threshold was undue hardship or extreme hardship.
- 3.38 Undue hardship has been described by the courts as serious hardship,⁴⁰ or excessive or greater hardship than the circumstances warrant.⁴¹ Extreme hardship has been described as hardship that is excessive in the particular circumstances of the case, 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).⁴² It is an objective test, not based on how the particular offender may perceive the extent of the hardship.

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

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

42 *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.

- 3.39 While the descriptions of the tests sound similar, the courts regularly distinguish between the two levels of hardship. In the context of motor vehicle confiscations, the court must not make an order for confiscation if it will result in *extreme* hardship to the offender or *undue* hardship to any other person.⁴³ A similar distinction is drawn in applications for a limited licence under the Land Transport Act 1998.⁴⁴ The courts have made it clear that extreme hardship is a more stringent standard.
- 3.40 Most submitters agreed that hardship to the accused should be taken into account in name suppression applications, but views as to the appropriate level of hardship differed. Some submitters supported an undue hardship threshold, while others suggested extreme hardship, real hardship, or significant harm out of proportion to the gravity of the alleged offence.
- 3.41 In the Issues Paper, we suggested that a test of undue hardship to the accused would be appropriate. Following submissions and consultation, however, we have come to the view that extreme hardship better describes the level of hardship that should be required to result from publication of the name of an accused before the court exercises its discretion to suppress. It makes it clear that suppression of the name of the accused should be exceptional. Where extreme hardship to an accused would result, the judge may decide that the harm which would be caused is disproportionate to the public interest in open justice and the freedom to receive information.
- 3.42 However in some cases, where there is a high public interest in open justice, even extreme hardship may not be sufficient to justify a restriction on publication, and as the courts have indicated in the past, the circumstances that will result in name suppression after a conviction for a serious offence will be rare.

Hardship to people connected with the accused

- 3.43 Whatever hardship test they considered appropriate, submitters were unanimous that the same threshold should apply in relation to family members or other people connected with the accused, such as employers or business partners. However, there are two situations to be considered in this regard. One is where the hardship to others is being taken into account as a factor in suppressing the name of the accused or convicted person. The other is where family members seek to have their *own* names suppressed on grounds of hardship, where we consider a lesser standard should apply. We will return to this latter situation in Chapter 4.
- 3.44 Where hardship to others is a factor in an application for suppression of name *by the accused*, we recommend that the test of extreme hardship should apply. Otherwise the high threshold required for suppression of the accused's name may be eroded. In this regard, we note the decision of the Court of Appeal in *R v Liddell*,⁴⁵ where the Solicitor-General appealed against the suppression of the name of a man convicted of sexual offences against children. Among the

43 Sentencing Act 2002, s 129(4).

44 Land Transport Act 1998, s 105.

45 *R v Liddell* above n 39, 544, per Cooke P.

grounds for suppression were the likelihood that publication would exacerbate the stress suffered by the convicted man's wife, and the likely effect on his school-aged sons. While noting these concerns as genuine, the court continued:

But anguish to the innocent family of an offender is an inevitable result of many convictions for serious crime. Only in an extraordinary case could it outweigh, in relation to the reporting of the name of a person convicted of a serious crime, the general principle of open justice and the open reporting of justice. Bearing in mind as well the particular public interest in reporting which...is present here, we do not think that this case is sufficiently exceptional.

- 3.45 However, in that case the court did make a more limited order prohibiting the publication of the name, address or occupation of the accused's wife or either of his sons. While publication of the accused's identity would necessarily lead some members of the public to identify the wife and sons, the court saw no reason why these innocent people should not receive such protection as the statute enabled. In our view, this is consistent with applying a lesser test of undue hardship to consideration of the suppression of names of persons connected with the accused.

Risk of suspicion being cast on others

- 3.46 One reason often given for refusing suppression is to avoid public speculation about who the offender is, and suspicion wrongly being cast on other people as a result.⁴⁶ However, there will be rare occasions where the court finds sufficient grounds to suppress the name of the accused, such as issues related to his or her mental health, but where publication of another particular, such as the accused's occupation, would not identify the accused, but might cause suspicion to fall on a limited class of other people. Even more rarely, that suspicion may result in damage to those other people that cannot be undone by the eventual publication of the name of the accused: for example, where the relevant occupation is one involves a relationship of trust with clients, and a person loses business because others wrongly believe he or she is the offender.
- 3.47 Often, the court will simply suppress the occupation of the accused as part and parcel of suppressing the accused's identity. But the court should have the power to suppress particulars such as the accused's occupation on the basis that publication will cast suspicion on other people that may result in undue hardship to them. We recommend accordingly.

Impact of publication on well known people

- 3.48 The Issues Paper asked whether the fact that name suppression may have a greater impact on well known people should affect suppression decisions, and whether it should be listed as a separate statutory factor to be considered. Some submitters held strong views on this issue, but responses were divided.

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

- 3.49 Most submitters did not consider that the fact that publication might have a greater impact on well known people should affect suppression decisions. The Media Freedom Committee referred to *Lewis v Wilson & Horton*,⁴⁷ where the Court of Appeal stated that it could not enter into an assessment of whether media or public interest is appropriate or “undue”.
- 3.50 However, in *Lewis v Wilson & Horton* no harm to the appellant was suggested beyond the submission that his standing would make media interest in him “undue.” The Court of Appeal noted that his standing was not grounds for suppressing his name *in the absence of evidence of special harm to him through publicity*. It went on to say that in cases where some real harm is identified, it may be necessary for the judge to decide whether the harm which would be caused was disproportionate to the public interest in open justice.⁴⁸ In other words, the fact that someone is well known is not by itself grounds for name suppression, but nor is it an irrelevant factor. Several submissions acknowledged this distinction, noting that it should be considered as one factor among others. One submission emphasised the need to focus on the actual or potential impact on the particular accused, to avoid creating a class of persons who get preferential treatment.
- 3.51 We consider that the fact that there will be greater interest in publishing information about a particular accused because he or she is well known may be relevant to the court’s consideration of a suppression application, but only in so far as it relates in a particular case to the question of whether publication will cause extreme hardship to the accused. It should not be listed as a separate factor, as there is a risk that this may create a special class, a situation the courts have rightly tried to avoid.

Privacy

- 3.52 In the Issues Paper reference was made to recent decisions in which privacy and the right to human dignity were described as factors that should be taken into account in applications for suppression.⁴⁹ We asked for views as to whether privacy should be taken into account, and if so, what it means in this context.
- 3.53 We suggested that in cases in which privacy was described as a factor in name suppression for the accused, it was often being used to describe other underlying interests requiring protection, such as reputation, or mental or physical well-being. We suggested that these interests do not need to be described as privacy interests in order to be protected. Privacy evokes many other concepts as well, such as secrecy, confidentiality, and protection against unwanted access. Fairfax Media expressed a similar concern in its submission, suggesting that the concept of privacy would be difficult to confine in the context of name suppression.
- 3.54 Associate Professor Ursula Cheer submitted that if a tort of privacy develops to cover matters such as unwanted access to a person, such concerns might be relevant to questions of suppression in the future. But she continued:

⁴⁷ *Lewis v Wilson & Horton* above n 17, para 68.

⁴⁸ *Ibid.*

⁴⁹ *X v New Zealand Police* (10 August 2006) HC AKL CRI-2006-404-259, Baragwanath J, para 12.

However, the best course at this point in the development of the tort is to keep the two areas separate and distinct. So long as suppression decisions can take account of matters such as fear of harassment under the undue hardship heading, then privacy should not be referred to.

- 3.55 The Criminal Law Committee of the New Zealand Law Society suggested the concept of privacy referred to in a number of suppression cases might more appropriately be described as the need to have regard to a person's right to be treated with dignity, and not to be subject to humiliation or degrading treatment, even if the person is charged with serious offending.
- 3.56 The Press Council submitted that while it considered privacy is not an appropriate term to use, there might nonetheless be private interests that need to be balanced against public interests when determining suppression.
- 3.57 In *R v Mahanga*, the Court of Appeal said that there was no doubt that privacy interests of accused persons are generally displaced by the need for a public judicial process while that process runs its course:⁵⁰

As it was put by the Supreme Court of Canada: 'Public access to and reporting of those proceedings is a price that he and any other accused must pay in the interests of ensuring the accountability of those engaged in the administration of justice': *Vickers v Nova Scotia Supreme Court* (1991) 64 CCC (3rd) 65 at 94 per Stevenson J.

- 3.58 In our view, privacy interests of a person accused or convicted of a crime should not be a separate statutory ground for name suppression. Any relevant privacy interest should be taken into account in considering the question of hardship to the accused. Privacy itself should not be listed as a statutory factor.

The safety of any person

- 3.59 There may be occasions where the publication of the name of an accused or convicted person would endanger the safety of the accused, or of another person. In the case of the accused, this may be covered by hardship, but we recommend that it be set out as a specific ground for suppression of name.

Interests of justice

- 3.60 In the Issues Paper we suggested that the presumption of publication should also be rebutted where the court is satisfied that a suppression order would be in the interests of justice. We acknowledged the inherent vagueness of this test, but suggested it could be supplemented by including a list of factors to assist in determining what the interests of justice require. We discussed a number of factors, and asked whether there were others that should be included.
- 3.61 Having considered the possible factors further, we have concluded that if sufficient grounds for name suppression are specified in the legislation, a broader interests of justice test is not necessary. Leaving this test in creates uncertainty and invites inconsistency.

50 *R v Mahanga* [2001] 1 NZLR 541, para 22.

Where publication would identify another person whose name is suppressed

- 3.62 There may be situations in which the publication of the name of an accused would identify someone else whose name is suppressed, either by an order or by an automatic statutory provision such as section 139. For example there may be a family relationship between co-accused who share the same name, and one has suppression for reasons unconnected to the other. This should be a ground for prohibiting the publication of the name of the accused.

Maintenance of the law

- 3.63 There will be rare occasions where publication of the name of an offender may prejudice an on-going investigation, and a short period of name suppression may be justified. One example would be where there are other offenders that the police intend to arrest in connection with related offending, and there is a risk that they will abscond if they become aware that the defendant has been arrested and charged. We recommend that a ground be included to allow the name of an offender to be suppressed where publication would prejudice the maintenance of the law, including the prevention, investigation and detection of offences.

Terms of the court's power

- 3.64 Section 140 of the Criminal Justice Act 1985 empowers the court to prohibit publication of more than just the name of the accused or convicted person. The court can prohibit publication of the person's name, address, occupation, or any particulars likely to lead to that person's identification. This allows the court sufficient flexibility to tailor an order to the particular circumstances of a case. We recommend that this formulation be retained.

RECOMMENDATION

- R5 The courts should have the power to make an order prohibiting publication of the name, address, or occupation of a person accused or convicted of an offence, or any particulars likely to lead to that person's identification, on any of the following grounds:
- (a) where there is a real risk of prejudice to a fair trial;
 - (b) to prevent undue hardship to victims;
 - (c) to prevent extreme hardship to the accused and/or persons connected with the accused;
 - (d) where publication would endanger the safety of any person;
 - (e) where publication would identify another person whose name is suppressed by order or by law;
 - (f) where publication would be likely to prejudice the interests of the maintenance of the law, including the prevention, investigation and detection of offences;
 - (g) where publication would cast suspicion on other people that may result in undue hardship.

RECOMMENDATION

R6 Where a person is accused or convicted of offences under section 130 or 131 of the Crimes Act 1961 (incest or sexual conduct with a dependent family member), the name and identifying particulars of the person accused or convicted of the offence should be automatically suppressed, to prevent the victim being identified. The victim should be able to apply to the court for publication of the offender's name, and the court must make such an order if the victim is 16 or over, and the court is satisfied that he or she understands the nature and effect of the decision.

FUTILITY

3.65 Where information as to the identity of someone appearing before a court is already in the public domain, it will not generally be appropriate to grant name suppression.⁵¹ The law will not undertake an exercise in futility, which would bring its own authority and processes into disrepute. However, not all releases of information will have the same impact. There are issues of degree to be considered as to how widely available the information is, what form the publication has taken, and whether proximity to the trial is a relevant factor.

3.66 There was general agreement among submitters that futility should be a reason for declining suppression orders. The Criminal Law Committee of the New Zealand Law Society expressed a contrary view, submitting that continued publicity may be just as damaging as, or more damaging than, earlier publicity. At the other end of the spectrum, the New Zealand Herald expressed the view that much suppression is futile:

Often people before the courts are so well known in their local communities that the only effect of suppression is to deny publication of common knowledge... The internet creates a kind of global village effect in which local knowledge like this can be easily spread and readily discovered. The implications were made clear in this country when the billionaire's name [Lewis] appeared on American websites long before suppression was lifted in New Zealand.

Since then we have seen internet breaches of suppression orders in the celebrity drugs case, the police rape trials and the so-called terror tapes. This trend is sure to increase in cases where public interest is intense enough, meaning the only practical effect of such orders will be to prevent the media publishing what everyone knows.

3.67 Other submitters believed that there were circumstances where suppression orders should be made despite an earlier publication, if part of the purpose for which the order was made could still be achieved. In its submission, the News and Current Affairs Department of Television New Zealand noted that this is not an area that lends itself to legislative definition, and it should be left to the judiciary to assess when the need arises. We share this view, and make no recommendations for change to the legislation in this regard.

51 *Lewis v Wilson & Horton Ltd*, above n 17 para 94, per Elias CJ.

INTERIM NAME SUPPRESSION FOR THE ACCUSED Applications at first appearance

- 3.68 Earlier in this chapter we described the issues that can arise where pre-trial applications for interim name suppression are made in the list court, due to pressure of time and lack of information. In our view, these considerations dictate the need for a special procedure to preserve the court’s ability to make an order suppressing the defendant’s name when more information is available.
- 3.69 We heard views expressed in submissions and consultation that interim orders to suppress the name of an accused are granted almost routinely in the lower courts. The District Court has already taken steps to try to meet similar concerns expressed by the media. In 2008 the Chief District Court Judge initiated guidelines for interim name suppression applications in the Manukau and Auckland District Courts, and published them in the District Court Criminal Law Review by way of guidance to other judges.⁵² He stressed that interim name suppression applications granted in a list court should be for a finite period to expire at the next hearing, and if counsel wished to seek a continuation of name suppression, they should file written submissions supported by affidavits.
- 3.70 Our recommendations in relation to interim orders aim to build on this initiative. We initially considered and then rejected the idea of an automatic period of interim suppression to apply in all cases, on the basis that this would not be a reasonable limit on freedom of expression, nor would it give sufficient weight to the presumption of open justice. Not all accused people will want name suppression; others may not even be able to make out an arguable case.
- 3.71 Instead we recommend that on first appearance, an accused should be entitled to an interim order for name suppression if he or she advances an arguable case for suppression. The order should expire at the next appearance (which is usually two or three weeks later). This gives the accused an opportunity to seek legal advice and, if appropriate, gather evidence to support another application. The interim suppression order should not be renewed unless evidence supporting the grounds is produced.

Applications for interim orders in other circumstances

- 3.72 Putting aside interim orders made at first appearance, should the court take a different approach to pre-trial applications for name suppression than applications made once the trial commences? In a submission in response to the Issues Paper, Justice Baragwanath emphasised that the stage of the trial is an important consideration when suppression orders are sought. He noted that during and after trial, when the defendant has the opportunity to present a defence, or has been convicted, the position may be wholly different from the outset of the proceedings, where the defendant has not yet had that opportunity:

It is well known that pejorative publication will remain in the public mind whatever the result of the case. Counsel and judges with experience in criminal law can give instances of cases where great damage would have been done but for restraining orders: for instance, at the pre-trial stage the accused may establish alibi; the complainant may acknowledge that the allegation is baseless.

52 District Court Criminal Law Review, April 2008, Issue 22, 1.

- 3.73 We share Justice Baragwanath's view that the stage of the proceedings is an important consideration in suppression applications. In some cases, at the pre-trial stage, publication of the name of an accused may result in irreparable harm to reputation, without his or her having the opportunity to put the other side of the case.
- 3.74 This is a matter that should be taken into account by the judge in terms of assessing whether publication will cause extreme hardship to the accused, such as to justify rebutting the presumption of open justice and limiting the right to freedom of expression by making an order for suppression of name.
- 3.75 However, we do not consider that this risk justifies rebutting the presumption of open justice *generally* at the pre-trial stage, or limiting the right to freedom of expression in all cases before trial. In the majority of situations, the accused will not suffer such damage from the publication of his or her name before trial as to warrant name suppression. There was strong opposition in submissions to any attempt to return to the short-lived position in 1975 in which the presumption of openness at the pre-trial stage was overturned, and there was no publication of names or identifying particulars of an accused prior to conviction unless the court ordered otherwise.⁵³

RECOMMENDATION

- R7 On first appearance, an accused should be entitled to an interim order for name suppression if he or she advances an arguable case for name suppression. The order should expire at the next appearance, and should not be renewed unless evidence supporting the grounds is produced.

ASCERTAINING THE VICTIM'S VIEWS

Orders for permanent name suppression

- 3.76 Where an offender applies for an order for permanent name suppression, currently 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. It is the prosecutor's responsibility to ascertain these views and put them before the court. The complainant's attitude, whether in favour of or against suppression, is not decisive.⁵⁴
- 3.77 There are some practical issues that arise in the way section 28 of the Victims' Rights Act 2002 currently works. We received a submission from a woman whose daughter was killed by a disqualified driver in a collision in 2006. The offender had been relocated with a new identity under the New Zealand Police Witness Protection Programme. The circumstances were eventually the subject of a Ministerial inquiry, but the matter that was raised in submission related to the suppression of the offender's name in the criminal proceedings that resulted from the collision. Despite the provisions of the Victim's Rights Act 2002, the submitter said that she and her family were not formally consulted

⁵³ Criminal Justice Act 1954, s 45B.

⁵⁴ *R v Kealey* (2001) 18 CRNZ 602 (CA).

or told of their rights, and their views were not communicated to the court. She suggested that victims should have free access to independent legal advice and representation separate to the police prosecutor.

- 3.78 The Ministry of Justice is currently reviewing a number of issues in relation to the Victims' Rights Act 2002. We have forwarded this submission to them to be considered in the context of that review.

Interim orders

- 3.79 In the Issues Paper, we asked whether the views of the victim should also be taken into account in interim applications for name suppression by an accused. Most submitters who responded to this question considered that the victim's views should only be taken into account in relation to interim name suppression of an offender if publication would have a detrimental impact on the victim. We agree with this view, and consider that this matter is covered by the inclusion of undue hardship to the victim as a ground for suppression of the name of the accused.

Chapter 4

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

NAMES OF VICTIMS

- 4.1 The court's power to suppress the names of victims is founded in its general power to suppress names under section 140 of the Criminal Justice Act 1985.

Starting presumption

- 4.2 At present, with two exceptions, the presumption of open justice applies to the names of victims of crime. The exceptions appear in sections 139 and 139A of the Criminal Justice Act 1985, relating to victims of sexual offences, and children under the age of 17 who are called as witnesses in criminal proceedings.
- 4.3 In the Issues Paper, we asked whether open justice was the appropriate starting point for publication of victims' names in some or all cases, or whether there should be automatic name suppression for all crime victims, subject to the power of the court to order publication. There was overwhelming support in submissions for open justice as the starting point for publication of victims' names.
- 4.4 One submission, from Victim Support, advocated automatic name suppression for all crime victims. It set out four arguments in support:
- all victims of crime have the right to be treated with courtesy and compassion and to have their dignity and privacy respected;
 - re-victimisation, by naming victims against their wishes, needs to be prevented;
 - the potential psychological harm [resulting from publication] is not necessarily related to the type of crime;
 - publicly naming victims can be a deterrent to reporting crime.
- 4.5 We acknowledge the force of these arguments, but we do not believe that they justify a general reversal of the presumption in favour of open justice. Nor would the automatic suppression of names of victims be a reasonable limit on the right

to freedom of expression set out in section 14 of the New Zealand Bill of Rights Act 1990. In particular cases, suppression of the name of a victim may well be justified for one or more of the reasons set out in the submission. But there are many cases in which publication of the name of the victim will not cause the sort of harm described by Victim Support. Any limits on open justice and freedom of expression should be kept as narrow as possible. The appropriate approach is not to reverse the presumption in favour of publication, but to ensure that where there is a risk of damage in a particular case, the court has the power to suppress the name of the victim. We return below to consider what grounds should be set out in the legislation.

- 4.6 However, we consider that a reversal of the presumption of open justice is justified in the case of victims of sexual offences. These victims should continue to have automatic name suppression.

Victims of sexual offences

- 4.7 Section 139 operates to protect people who are the victims of the sexual crimes set out in sections 128 to 142A or 144A of the Crimes Act 1961.⁵⁵ 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,⁵⁶ 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.⁵⁷ If there were two or more victims of an offence, each victim must agree.
- 4.8 In our view the automatic suppression provisions set out in section 139 are justified. Submissions endorsed this view, with only one submitter suggesting that the suppression should be available on request, rather than automatically. Sexual offences are a special category because of their highly personal and sensitive nature. There are 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. Automatic name suppression is appropriate, subject to the power of the court to permit publication at the victim's request.

55 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 16 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).

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

57 *Ibid*, s 139(1A).

- 4.9 In the Issues Paper we noted that 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,⁵⁸ and in our view, it is appropriate that there be a power to do so.
- 4.10 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.⁵⁹ There is authority that unless a statute provides otherwise, a District Court judge cannot make a suppression order after that time, nor vary nor revoke one already made.⁶⁰ It seems likely that section 139 was intended to remove this difficulty. For the avoidance of doubt, we recommend that the legislation should be phrased to make it clear that the courts may grant orders on the application of a victim allowing their identification *at any time* after a trial.

Child victims

- 4.11 In the Issues Paper we noted that 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, but that the same protection does not extend automatically to all victims under the age of 17. The name of a victim under 17 will only be automatically suppressed if he or she is called to give evidence.
- 4.12 We suggested that this was an anomaly, and that the automatic name suppression provisions should be extended to apply to all child victims, whether they gave evidence in the proceeding or not. There was some support for this proposal in submissions, although a number of submitters suggested it should left as a matter for the exercise of judicial discretion in a particular case.
- 4.13 At first sight, automatic name suppression for child victims appears to be consistent with the general approach taken by the law to protecting children and young people involved in court proceedings. But does it constitute a reasonable and demonstrably justified limit on the right to freedom of expression? We have concluded that it does not. While there will be cases in which publication of the name of a child victim may cause undue hardship to the child, there will be many other cases in which it will not. If a bike belonging to a 12 year old is stolen, why should the name of the victim be automatically suppressed? There is no compelling reason to curb the principle of open justice in the

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

59 Burrows and Cheer, *Media Law in New Zealand* (5 ed, 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.

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

case of *all* child victims. Where hardship to a child victim will result from publication, this can be dealt with under the proposed ground of undue hardship to victims.

- 4.14 We are also concerned that automatically suppressing the names of child victims would lead to an unintended outcome: the general suppression of the name of a parent who offends against his or her child, in order to avoid identifying that child. We note that the automatic suppression of the name of a child witness under section 139A does not prevent the publication of the name of the defendant, or the nature of the charge.⁶¹ A similar provision could be inserted in the case of child victims, but in most cases of assault by a parent on a child it would render futile automatic name suppression for the child, as identifying the parent would necessarily identify the child.
- 4.15 For these reasons, we do not recommend extending the automatic name suppression provisions to apply to all child victims.

Other victims

- 4.16 Besides victims of sex offences, are there other categories of case in which a justified limitation on the right to freedom of expression is made out, and the presumption of open justice should be reversed? In our view, this would be appropriate if the level of hardship caused to the victim by publication would be sufficient to rebut the presumption of openness in the majority of cases.
- 4.17 Several submitters suggested that automatic name suppression should be extended to victims of domestic violence. Others submitted that the categories for automatic name suppression should not be extended, but that name suppression for other victims should be a matter for the exercise of judicial discretion in a particular case.
- 4.18 We have considered extending automatic name suppression to include victims of domestic violence, but ultimately rejected this approach. In our view it would only add to the hidden nature of the problem of domestic violence, as in many cases automatic suppression of the name of the victim would require suppression of the name of the offender, to avoid identifying the victim. While in particular cases this may be appropriate, it does not seem to us that it should be the rule in all cases. It would be better to consider the circumstances of victims of domestic violence on a case by case basis.
- 4.19 We do consider, however, that specific grounds should be set out in legislation for the suppression of the names of victims. This is preferable to relying on common law rules that develop on an ad hoc basis: it provides greater certainty and guidance for judicial officers. As Victim Support noted in its submission, publication of name can have consequences for victims. Where there is a risk to a victim's safety, or to the safety of any other person, or where publication would result in undue hardship to the victim, there should be a power to suppress the victim's name.

⁶¹ Criminal Justice Act 1985, s 139A(2).

- 4.20 A requirement for prosecutors to inform victims about the availability of these grounds for suppression of their names could appear either in the Victims' Rights Act 2002, or in prosecution guidelines, or both.

Terms of the court's power

- 4.21 Section 140 empowers the court to make an order preventing publication of the name, address or occupation of a victim (because s/he is "a person connected with the proceedings"), or any particulars likely to lead to that person's identification. We recommend that the court should have similar powers to suppress more than just the victim's name under the new legislation – occupation, address and any particulars likely to identify the victim should be included in the statutory formula.

RECOMMENDATION

- R8 The provisions of section 139 of the Criminal Justice Act 1985 allowing automatic suppression of the names and identifying particulars of victims of specified sex offences should be carried forward into the new legislation.

RECOMMENDATION

- R9 The court should have the power to make an order preventing publication of the name, address, or occupation of a victim, or any particulars likely to lead to that person's identification, where publication:
- (a) would endanger the safety of any person; or
 - (b) would result in undue hardship to the victim.

WITNESSES

Starting point

- 4.22 In the Issues Paper we indicated that 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. Most submitters agreed that open justice is the appropriate starting point in the case of publication of witnesses' names.
- 4.23 We suggested in the Issues Paper that publication of witnesses' names rarely has an adverse impact on a witness. In his submission, Hugh Rennie QC disagreed vigorously with this statement, noting that he has seen many examples of witnesses who suffer from the reaction of people with whom they live or work, including harassment and being "sent to Coventry".

- 4.24 We acknowledge that there are cases where publication of a witness's name could endanger his or her safety, or cause difficulty or hardship. We recommend that the same tests should apply to witnesses as we recommend for victims, namely that there should be grounds to suppress the name or identity of a witness where publication:
- would endanger the safety of any person; or
 - would cause undue hardship to the witness.
- 4.25 Specific statutory provisions already exist to protect the identity of witnesses who are undercover police officers, and to allow for witness anonymity orders to be made in certain situations. We discuss these provisions below.

Child witnesses

- 4.26 As noted above, section 139A of the Criminal Justice Act 1985 currently provides an automatic prohibition on the publication of names and identifying particulars of children under the age of 17 who are called as witnesses in criminal proceedings. This provision first appeared in section 97 of the Children and Young Persons Act 1974, before being incorporated into the Criminal Justice Act 1985 in 1989.⁶²
- 4.27 In the Issues Paper, we asked whether this automatic prohibition was justified. Most submitters who responded to this question considered that it was, although the News and Current Affairs Department of Television New Zealand submitted that there should be room for judicial discretion in individual cases, such as where the name of a child in particular proceedings is already well known from prior proceedings or events. The example given was a recent kidnapping case where a court case followed a nationwide search for the child, whose name and image were widely publicised at the time he was missing. In the resulting court case, the names of the accused could be published, but the child's could not, despite the fact that it was already well known.
- 4.28 We have no doubt that the identity of child witnesses should often be suppressed. Appearing as a witness in a case can be a stressful experience, and child witnesses may be particularly vulnerable in this regard. However, similar issues arise in relation to the automatic suppression of the names of child witnesses as for child victims. There will be many cases in which being identified as a witness in a proceeding does not create hardship for a child. For example, the matter may involve a minor offence, or the child's evidence may be non-controversial. Sometimes, as in the example given by Television New Zealand, the automatic suppression will be futile, but cannot be waived.
- 4.29 We have concluded that the names of child witnesses should not be automatically suppressed by statute. Instead, the court should have the power to suppress names of child witnesses on the same grounds as the names of other witnesses: where publication would endanger the safety of any person, or where publication would cause undue hardship to the witness.

⁶² Children, Young Persons and Their Families Act 1989, s 454.

Other statutory exceptions

Evidence Act 2006

- 4.30 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. In our view, these limits on open justice and freedom of expression are justified. There were no concerns raised in submissions about the appropriateness of the protections set out in the Evidence Act 2006.
- 4.31 At the moment, sections 108 and 109 of the Evidence Act 2006 limit the offences in relation to which undercover police officers may give evidence and have their identity protected. The Legal Section of the New Zealand Police submitted that it would be beneficial if the current identity protection provisions were expanded to allow undercover officers to give evidence on a wider set of offences, including offences under the Arms Act 1983, theft and receiving offences and some drug offences that are not presently covered. They also noted that in the United Kingdom there is no offence threshold – it is left to the judge to determine whether identity protection is appropriate.
- 4.32 Revisiting the scope of sections 108 and 109 goes beyond the terms of reference of the present project, but the Law Commission will consider it further in the context of its statutory function of monitoring the Evidence Act 2006.

Security Intelligence Service

- 4.33 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 Service, without the consent of the Minister.
- 4.34 In our view, this is a justified limit on open justice and freedom of expression. Most submitters considered this provision to be appropriate. We do not recommend any change in this regard.

Terms of the court's power

- 4.35 The court should have the power to suppress the name, occupation, or address of a witness, or any particulars likely to lead to the witness's identification.

PERSONS CONNECTED WITH THE PROCEEDING

- 4.36 In the Issues Paper, we noted that in the past, the courts have used section 140(1) of the Criminal Justice Act 1985 to prohibit the publication of names, addresses and occupations of family members of the accused, even when the name of the accused was not suppressed, on the basis that they were persons “connected with the proceedings”.⁶³ However, in the recent decision in *R v Shapiro*,⁶⁴ the Court of Appeal did not accept that the jurisdiction under section 140 extends to prohibition of publication of the name of an entity

⁶³ *R v Liddell* [1995] 1 NZLR 538 (CA).

⁶⁴ *R v Shapiro* [2008] NZCA 151.

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.⁶⁵

- 4.37 Thus it now appears that there is no law allowing 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. There was some support in submissions for redressing this anomaly, but several submitters also emphasised the need to keep any such grounds narrow.
- 4.38 Fairfax submitted that the phrase “persons connected with the accused” was too vague and might invite a flood of applications for suppression by employers, relatives, witnesses and friends. However, we note that for many years until the decision in *Shapiro*, the approach of the courts was that section 140 did provide protection for persons connected with the accused. A flood of applications for suppression did not result.
- 4.39 We recommend that the court should have the power to make an order preventing publication of the identity of persons connected with the accused, or the proceedings, where publication would otherwise result in undue hardship to that person, whether or not the name of the accused is suppressed.

RECOMMENDATION

- R10 The court should have the power to make an order preventing publication of the name, address or occupation of a witness, or any particulars likely to lead to that person’s identification, where publication:
- (a) would endanger the safety of any person; or
 - (b) would cause undue hardship to the witness.

RECOMMENDATION

- R11 There should not be an automatic prohibition on the publication of the names and identifying particulars of child witnesses in criminal proceedings. Section 139A of the Criminal Justice Act 1985 should be repealed and not replaced.

RECOMMENDATION

- R12 The court should have the power to make an order preventing publication of the identity of persons connected with the accused or the proceedings where publication would otherwise result in undue hardship to that person, whether or not the name of the accused is suppressed.

65 Ibid, para 19.

Chapter 5

Closing the court

GROUNDS FOR CLOSING THE COURT

- 5.1 Section 138 of the Criminal Justice Act 1985 contains a statutory recognition of the open justice principle,⁶⁶ and authorises the closing of the court on the same grounds as evidence and the names of witnesses may be suppressed (namely the interests of justice, public morality, the reputation of any victim of any alleged sexual offence or offence of extortion, or the security or defence of New Zealand). 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. There are exceptions made in the legislation for the media, to which we will return shortly.
- 5.2 Closure of the court must also be considered against the terms of Article 14(1) of the United Nations International Covenant on Civil and Political Rights, which New Zealand ratified in 1978.⁶⁷ Article 14 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 (ordre public) 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 judgement 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.
- 5.3 The right to a fair and public hearing by an independent and impartial court is confirmed in section 25(a) of the New Zealand Bill of Rights Act 1990, and according to section 5, may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

66 *Paraha and ors v New Zealand Police* [2008] NZAR 581, para 14, Heath J.

67 http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en (accessed 18 September 2009).

- 5.4 There was a common view in submissions that the court should be closed only in extreme circumstances. In its submission, the News and Current Affairs Department of Television New Zealand noted that suppression and closing the court are two separate issues:

It is an integral part of the open justice principle that the public, including the media, can observe proceedings, whether or not there are limitations on reporting them.

- 5.5 We agree that closure should be a measure of last resort, and the court should be permitted to close the court only in exceptional circumstances where it is satisfied that the making of suppression orders is insufficient to protect one or more of the interests at stake. We do not consider that the provisions of section 138 adequately reflect the high threshold required for closing the court. Greater specificity is required in the legislative grounds.

- 5.6 We recommend that there should be a power to close the court (subject to exceptions for members of the media, discussed below) in criminal proceedings:

- (a) where the court is satisfied that the order is necessary to prevent undue disruption to the conduct of proceedings; or
- (b) where the court is satisfied that:
- the security or defence of New Zealand so requires; or
 - the order is necessary to avoid a real risk of prejudice to a fair trial; or
 - the order is necessary to avoid endangering the safety of any person; or
 - the maintenance of the law, including the prevention, investigation and detection of offences so requires;

AND the court is satisfied that an order for suppression of name or evidence alone is not sufficient to offset the risk identified.

Section 375A (1) – (3) Crimes Act 1961

- 5.7 In the Issues Paper, we discussed section 375A (1) – (3) of the Crimes Act 1961, which contains a statutory power designed to make it easier for a complainant in a sexual case to give evidence by excluding the general public while the complainant is giving evidence. A similar provision appears in section 185C of the Summary Proceedings Act 1957. We consider this protection is appropriate, and recommend that a provision to this effect be included in the general grounds on which the court may be closed.

- 5.8 We asked in the Issues Paper whether there were other categories of witness that require similar protection. No new categories were proposed by submitters, and we do not propose that any new categories should be created.

Other grounds

- 5.9 In consultation, some judges indicated that there are very occasionally situations in which they wish to discuss with counsel matters relating to the performance of counsel during proceedings. They consider this is a matter that should be dealt with in chambers, in other words, not in open court. We recommend that the legislation contain a limited proviso to this effect.

Grounds for excluding the media

- 5.10 Section 138(2)(c) suggests that the media will only be excluded from the court in rare cases where matters of security or defence arise. We suggested in the Issues Paper that this may be because there is a greater perceived risk of harm from the release of information about defence or security than there is from the release of other types of information, so that this information needs greater protection.
- 5.11 Submitters were split in their views as to whether the power to exclude the media where matters of security and defence so require is appropriate. The News and Current Affairs Department of Television New Zealand suggested that the current threshold is appropriately high – the difficulty is with individual judges who may exclude media without that threshold being met.
- 5.12 In her submission, Associate Professor Ursula Cheer suggested that the power to exclude the media in these cases does not suggest a lack of trust in the media, but rather recognition of the reality that sometimes mistakes occur, and suppressed information is inadvertently reported. Some information may be so sensitive that there is justification for attempting to ensure that such mistakes cannot occur.
- 5.13 We agree with this analysis. We recommend that the power to exclude members of the media should remain where the court is satisfied that matters of security and defence so require: not because of the risk of a deliberate breach, but because of the danger of an inadvertent breach with serious consequences.
- 5.14 In the Issues Paper we asked whether there were other cases where the media could or should be properly excluded. Most submitters said no. The Criminal Law Committee of the New Zealand Law Society suggested that there should be a similar power to protect the interests of victims, witnesses and other participants in the process. However, in our view, those interests can be adequately protected by the suppression of name and evidence, and do not justify the exclusion of the media from the hearing.

Accredited media

- 5.15 Making exceptions for the media in relation to court closures raises the question of how to distinguish bona fide members of the media from interested members of the public. Section 138(3) provides that the power of exclusion under section 138(2)(c) 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.⁶⁸ The same expression is also used (without being defined) in numerous other pieces of legislation in relation to attendance at or exclusion from court proceedings.⁶⁹

- 5.16 The phrase “accredited news media reporter” has been defined on an operational basis in the Family Court context, although the definition does not appear in legislation. A reporter employed by an accredited news media organisation may attend a Family Court hearing under the Care of Children Act 2004.⁷⁰ The operational practice is that a news organisation is “accredited” if the organisation is subject to a code of ethics or professional standards and a relevant complaints 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.
- 5.17 In the Issues Paper, we asked whether the approach of the Family Court to accredited news media was appropriate in criminal proceedings, and if not, whether there was some other means of distinguishing legitimate journalists from members of the general public.
- 5.18 Submitters were divided on this issue. Some thought that the approach of the Family Court worked well and could be used in criminal proceedings. Others strongly objected to the concept of accreditation and felt that the current informal system whereby journalists can present a business card or a letter from a commissioning editor was satisfactory.
- 5.19 In our view, the criteria employed by the Family Court are sensible, and address the key concerns that the idea of accredited news media is intended to capture in section 138. This is a situation in which the court considers there is particularly sensitive material in play. It is not unreasonable that people who are in an exceptional category and allowed to stay in court when the public is excluded should be subject to a code of ethics and a complaints process, or otherwise be approved by the judge.
- 5.20 Submissions indicated that the present system works well. Associate Professor Ursula Cheer gave a succinct summary of the situation:

The question of who are ‘legitimate media’ is becoming more and more problematic, especially given the increased status now attributed to some bloggers in particular in breaking and making the news...I think the Family Court legislation has made a reasonable fist of trying to deal with the problem currently. However it will soon be out of date, as media becomes less and less affiliated. At a certain tipping point,

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

69 See for example the Adoption Act 1955, s 22; Family Courts Act 1980, s 11A; Protection of Personal and Property Rights 1988, s 79; Care of Children Act 2004, s 137; Domestic Violence Act 1995, s 83; Family Proceedings Act 1980, s 159; Court Martial Act 2007; Children, Young Persons and their Families Act 1989, s 166; Crimes Act 1961, s 375A; Summary Proceedings Act 1957, s 185C; Armed Forces Discipline Act 1971, s 139; Social Workers Registration Act 2003, s 80; Health Practitioners Competence Assurance Act 2003, s 97.

70 Ministry of Justice *Media Guide for Reporting the Courts* (Second Edition, October 2008) <http://www.justice.govt.nz/media/media-guide-reporting-the-courts> para 5.4 (accessed 30 July 2009).

it might be seen as unfair to advantage 'accredited media' and more and more applications will be made on a case by case basis. Will that be a waste of the judge's time? Could a Registrar make these decisions? Frankly I don't know. On balance, the Family Court legislation approach will do for now. In any event, the approach should be consistent across all legislation.

- 5.21 We recommend that the new legislation contain a definition describing the members of the media who are entitled to remain in court when an order is made excluding the general public. In this context, the media should mean members of the media who are subject to a code of ethics and the complaints procedure of the Broadcasting Standards Authority or the Press Council, or such other persons reporting on the proceedings as permitted by the court on a case by case basis.

Verdict to be given in public

- 5.22 Section 138(6) currently provides that even if an order is made excluding the public from the courtroom, the announcement of the verdict or decision of the court and the passing of sentence must still take place in public. We recommend that a provision to this effect be included in the new legislation.

Bail hearings

- 5.23 Until the enactment of the Bail Act 2000, bail hearings were usually heard in chambers, particularly in the High Court, and the media were not present. Bail hearings involve discussion of prior convictions, breaches of bail on previous occasions, the strength of the evidence, and the views of the victim. Public reporting of these matters would carry obvious risks of prejudice to a fair trial. Because these matters were generally dealt with in chambers, questions of what information could be published seldom arose.
- 5.24 The introduction of the Bail Act 2000 changed the position. 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, but bail hearings often take place in open court, with the media in attendance.
- 5.25 Under section 19 of the Bail Act 2000, 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. When the hearing takes place in open court, unless the court makes an order, confusion sometimes arises as to what the media can and cannot report.
- 5.26 In the Issues Paper, we asked whether material discussed at bail hearings is so prejudicial that suppression ought to be presumptive or automatic. Responses from submitters were mixed. Most felt that the current provisions of the Bail Act 2000 are appropriate, and opposed the idea of an automatic prohibition applying. The Media Freedom Committee noted that judges should be able to determine what can be released in the public interest. Others considered that material put before the court in bail hearings should be automatically suppressed.

- 5.27 In our view, the risks to a fair trial from reporting of material at bail hearings are sufficiently serious that any confusion as to what can be reported needs to be removed. We recommend that the terms of the Bail Act 2000 should be recast, to make it clear that in the absence of a court order to the contrary, the media may only report the following matters:
- (a) the identity of the defendant applying for bail;
 - (b) the decision of the court on the application;
 - (c) the conditions of bail, if bail is granted.
- 5.28 Unless a judge orders otherwise, all other matters dealt with at a bail hearing should be suppressed until the conclusion of the trial. In this context, the conclusion of the trial means the end of the appeal period, or the disposition of any appeal.

RECOMMENDATION

R13 The court should have the power to make an order excluding from a criminal proceeding any persons other than the informant, any police employee, the defendant, any counsel engaged in the proceedings and any officer of the court, on any of the following grounds:

- (a) where the court is satisfied that the order is necessary to prevent undue disruption to the conduct of proceedings;
- (b) on the grounds presently set out in section 375A(1) – (3) of the Crimes Act 1961;
- (c) where the court is satisfied that:
 - the security or defence of New Zealand so requires; or
 - the order is necessary to avoid a real risk of prejudice to a fair trial; or
 - the order is necessary to avoid endangering the safety of any person; or
 - the maintenance of the law, including the prevention, investigation and detection of offences so requires;

AND the court is satisfied that an order for suppression of name or evidence alone is not sufficient to offset the risk identified.

RECOMMENDATION

R14 Except where the interests of security or defence so require, the power set out in Recommendation 13 should not be exercised so as to exclude members of the media who are subject to a code of ethics and the complaints procedure of the Broadcasting Standards Authority or the Press Council, or such other persons reporting on the proceedings as permitted by the court.

RECOMMENDATION

R15 The court should retain a limited power to discuss in chambers with counsel matters relating to the performance of counsel arising in the course of proceedings.

RECOMMENDATION

R16 Where an order is made excluding persons from the court, the announcement of the verdict or decision and the passing of sentence must still take place in public.

RECOMMENDATION

R17 The terms of the Bail Act 2000 should be recast, to make it clear that in the absence of a court order to the contrary, the media may only report the following matters:

- (a) the identity of the defendant applying for bail;
- (b) the decision of the court on the application;
- (c) the conditions of bail, if bail is granted.

Unless a judge orders otherwise, all other matters dealt with at a bail hearing should be suppressed until the conclusion of the trial (namely the end of the appeal period, or the disposition of any appeal).

Chapter 6

Jurisdiction, appeals and orders

REGISTRAR'S POWER TO MAKE ORDERS

- 6.1 Under section 46A of the Summary Proceedings Act 1957, court registrars may exercise the power conferred by section 140 of the Criminal Justice Act 1985 and prohibit publication of names for a limited period. This power may be exercised if the registrar:
- (a) adjourns the hearing of any charge under section 45 of the Summary Proceedings Act 1957;⁷¹
 - (b) grants a defendant bail under section 28 of the Bail Act 2000; or
 - (c) remands the defendant in custody under section 46 of the Summary Proceedings Act 1957.
- 6.2 The exercise of this power requires the consent of the defendant (where the informant seeks the order) or the informant (where the defendant asks for the order). Any suppression order made under this section may only have effect for up to 28 days, and the registrar can only exercise the power once in respect of any particular information.
- 6.3 We are concerned that this provision does not do enough to ensure the proper protection of open justice principles. It relies on a mechanism of consent to ensure that orders are not made inappropriately, but in our view this is misconceived. The informant has no interest in the matter, and in practice the police usually take a neutral position, rather than actively consenting.
- 6.4 The question of whether the name of a person accused of an offence should be suppressed is a matter for proper judicial decision making. It is one thing for a registrar to have a power to continue a name suppression order made by a judge, but we do not consider it appropriate for the registrar to have the power to make the original suppression order. We recommend that section 46A be amended to remove the power of a registrar to make (rather than continue) an order for suppression of name.

⁷¹ Section 45 provides that the registrar's power of adjournment may be exercised if the defendant is not in custody at the time of the application and the application is made before the commencement of the hearing.

- 6.5 It does not appear that this change will have a significant adverse effect in practice. In the nine months to September 2009, this power was exercised only 164 times nationwide. (There are 63 District Courts around the country.) The most frequent use of the power in any one court was 18 times in 9 months, or an average of two a month.⁷²

RECOMMENDATION

R18 Section 46A of the Summary Proceedings Act 1957 should be amended to remove the power of a registrar to make (rather than continue) an order for suppression of name.

INHERENT JURISDICTION

- 6.6 In the Issues Paper, we discussed the inherent jurisdiction of the High Court, which 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.⁷³ 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.⁷⁴ The inherent jurisdiction can be displaced by legislation.
- 6.7 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.⁷⁵
- 6.8 Section 138(5) of the Criminal Justice Act 1985 provides that the powers conferred under subsection 138(2) to clear the court, and to 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 to 141 of the Criminal Justice Act 1985. However, 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.⁷⁶
- 6.9 This section was introduced into the legislation following the decision of the Court of Appeal in *Broadcasting Corporation of New Zealand Ltd v Attorney-General*.⁷⁷ In that case the sentencing judge made sweeping orders excluding all members of the public, including accredited news media reporters, from the court. There was a statutory power to exclude the public from the courtroom set out in section 375 of the Crimes Act 1961, which allowed the court on any trial to exclude the public if it considered that the interests of justice, or of public

72 Figures provided by the Ministry of Justice, 28 September 2009.

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

74 *Paraha and ors v New Zealand Police* [2008] NZAR 581 para 23, Heath J.

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

76 *Paraha and ors v New Zealand Police*, above n 74, para 39.

77 *Broadcasting Corporation of New Zealand Ltd v Attorney-General* [1982] 1 NZLR 120.

morality, or the reputation of a victim of an alleged sexual crime or crime of extortion so required. The statutory power did not extend to excluding any accredited news media reporter.

6.10 In the Court of Appeal, Woodhouse P concluded that the power contained in section 375, when taken together with section 46 of the Criminal Justice Act 1954 (which provided for suppression of name), demonstrated a legislative intention to supplant any pre-existing inherent power to sit in camera on criminal cases. He concluded that the judge had no remaining inherent jurisdiction to close off the court, and certainly not by going to the lengths of excluding accredited news media reporters, in the face of the provisions of section 375(1).

6.11 However, while the other members of the Court agreed that the order had gone too far, and should be varied, they considered that section 375 of the Crimes Act 1961 did not apply in the present case. Even if it did, they held that the inherent jurisdiction remained intact. Cooke J noted:⁷⁸

The inherent jurisdiction exists because of necessity. It seems to me that Parliament should not be treated as having interfered with it unless that conclusion is clearly compelled by the terms or spirit of an Act. This would mean, for instance, that the proviso to s 375(1) only prevents accredited news media reporters from being excluded under the power conferred by that subsection – which is indeed all that the proviso says. There is nothing in the section to suggest that it was any part of the purpose of the legislature to impose limitation on the inherent jurisdiction.

6.12 We note that it is extremely rare for the inherent jurisdiction of the court to be ousted by legislation. We have found only two other examples in New Zealand legislation. Section 10 of the Foreshore and Seabed Act 2004 expressly ousts the inherent jurisdiction of the High Court to hear and determine any customary rights claim. The Bail Act 2000 ousts the inherent jurisdiction of the High Court in relation to persons who have been refused bail or had bail otherwise dealt with by a Community Magistrate.⁷⁹

6.13 In the Issues Paper we queried why the inherent jurisdiction was ousted only in relation to section 138, and asked whether it should be ousted in relation to all suppression orders. Responses were divided on this issue. Fairfax Media suggested that the inherent jurisdiction should be ousted in the interests of certainty and consistency, but a statutory discretion remain for dealing with novel situations. On the other hand, the Criminal Law Committee of the New Zealand Law Society submitted that it would be acceptable to retain the inherent jurisdiction as it has only minor impact.

6.14 As noted above, expressly ousting the inherent jurisdiction is an unusual step. As we are now proposing to set out in the legislation specific grounds for suppressing names and evidence, the use of the inherent jurisdiction should be unnecessary in all but a very few cases. Even then, according to the rule in

⁷⁸ Ibid, 128.

⁷⁹ Bail Act 2000, ss 40 – 41.

Taylor v Attorney-General,⁸⁰ the inherent jurisdiction can be used to supplement the power of a court under the relevant section, but not in a manner contrary to the statutory provision.

- 6.15 For these reasons, we do not recommend that the inherent jurisdiction of the court be ousted in relation to the suppression of name and evidence. However, we recommend that the existing ouster of the inherent jurisdiction in relation to the power to close the court be continued. The right to a public hearing lies at the heart of open justice, and the bases for closing the court should be closely circumscribed.

Trials derive their legitimacy from being conducted in public; the judge presides as a surrogate for the people, who are entitled to see and approve the power exercised on their behalf...No matter how fair, justice must still be seen before it can be said to have been done.⁸¹

RECOMMENDATION

R19 The existing ouster of the inherent jurisdiction in relation to the power to close the court should be continued.

REASONS

Obligation to give reasons

- 6.16 There was unanimous support in submissions for a statutory requirement that reasons should be given for the grant or dismissal of a suppression order. The higher courts have frequently stressed the importance of giving reasons, but examples were still provided in consultation of situations in which, without explanation, no reasons were made available for a decision. We recommend that there should be a statutory requirement that reasons must be given for the grant or dismissal of a suppression order.
- 6.17 As noted in Chapter 5, section 138(6) currently provides that even if an order is made excluding the public from the courtroom, the announcement of the verdict or decision of the court and the passing of sentence shall still take place in public. However, if the court is satisfied that exceptional circumstances so require, it may decline to state in public any or all of the facts, reasons, or other considerations that it has taken into account in reaching its decision or verdict, or in determining sentence. We recommend that a provision to this effect should also appear in the new legislation.

RECOMMENDATION

R20 There should be a statutory requirement that reasons must be given for the grant or dismissal of a suppression order. However, if the court is satisfied that exceptional circumstances so require, it should have the power to decline to state in public any or all of the facts, reasons, or other considerations that it has taken into account in reaching its decision or verdict, or in determining sentence.

⁸⁰ *Taylor v Attorney-General* [1975] 2 NZLR 675.

⁸¹ G Robertson & A Nicol, *Robertson & Nicol on Media Law*, (4 ed, Sweet & Maxwell, London 2002) 402.

PRESERVING
THE COURTS'
ABILITY TO
MAKE ORDERS

- 6.18 In the Issues Paper, we asked whether there should 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. This would prevent any media outlet pre-empting an application for a suppression order by publishing the name of an accused immediately following arrest.
- 6.19 As we noted in the Issues Paper, arguably any such action by a media outlet would be a contempt of court.⁸² Would it be preferable to have a clear statutory rule to prevent such action? There were mixed responses from submitters to this question. While some thought a statutory provision would be a good idea, others submitted that it was a disproportionate response. The Press Council noted that it has never received any complaints about a newspaper naming an arrested person before their appearance in court.
- 6.20 We have concluded that a statutory provision preventing the publication of the name of an arrested person before their court appearance is not necessary at the present time.

TERMINATION
OF INTERIM
ORDERS

- 6.21 In the Issues Paper, we asked whether there should be a mandatory requirement for judges to specify the date of termination of an interim suppression order. Although section 140(2) suggests that the duration of an order for name suppression should be made clear in the order itself, orders are often allowed to run on indefinitely.
- 6.22 Another option is to define the term of an interim order by reference to the next court event, such as “until trial”, rather than to a specific date. This can also pose problems: in the Issues Paper we referred to one case in which an interim order was to continue until an accused’s trial, and could not be discharged when he died before the trial could take place. It also means that the judge is trying to predict the course of the proceeding: an order may be expressed as “until trial” when in fact a guilty plea follows soon after.
- 6.23 On the other hand, if judges are required to specify a date rather than an event in interim orders, this may result in matters having to come before the court again just to extend the date of an order if a trial date shifts.
- 6.24 We have concluded that judges should specify a date for termination of a suppression order, rather than an event. This will generally be the date on which the defendant is next remanded to appear. The work that the Law Commission and the Ministry of Justice are doing on the simplification of criminal procedure will result in a new process for summary and indictable cases. After entering a plea, defendants will generally be remanded to a case review date. On this date, the defendant may appear before a registrar. In such cases, the registrar should have power to continue the suppression order until the date on which the defendant next appears before a judge.

82 J Burrows and U Cheer, *Media Law in New Zealand* (5ed, Oxford University Press, Melbourne, 2005) 343; *C v Wilson & Horton Ltd* (27 May 1992) HC AKL CP 765/92, 3, Williams J.

RECOMMENDATION

R21 The date on which an interim order for suppression will terminate must be specified in the interim order.

RECOMMENDATION

R22 Court registrars should have a power to continue an interim order for suppression until the date on which the defendant next appears before a judge.

APPEALS

- 6.25 Inconsistencies arise in relation to appeals against orders for suppression. There are a number of differences between appeals from decisions of the District Court and the High Court, and between decisions made in the summary jurisdiction (i.e. those cases in the District Court that are usually heard by a judge alone) and those made in the indictable jurisdiction (i.e. the more serious criminal offences, usually tried by a jury). There does not seem to be any policy basis for these differences.
- 6.26 The Law Commission and the Ministry of Justice are currently considering appeals as part of the broader Criminal Procedure (Simplification) project, of which this reference forms part. The issues raised below in relation to appeals will be considered as part of that project.

Statutory provisions

District Court

- 6.27 Section 115C of the Summary Proceedings Act 1957 provides that applicants for an order under sections 138(2)(a) or (b) or 140 of the Criminal Justice Act 1985, or the informant, may appeal to the High Court against the District Court's decision in respect of the application. An appeal must be lodged within three days.⁸³
- 6.28 This section must be read in conjunction with section 115DB, and section 28E(2B) of the District Courts Act 1947. Some uncertainty results from the way these provisions interact.
- 6.29 Section 28E(2B) provides that either the prosecutor or the applicant may appeal to the High Court against the making or refusal of an order under section 138(2) (a) or (b) or section 140; and the provisions of section 115C of the Summary Proceedings Act 1957, as far as they are applicable and with all necessary modifications, shall apply accordingly. This section was inserted into the District Courts Act 1947 by an amendment in 1993,⁸⁴ following a High Court decision in *M v Police*,⁸⁵ where Tipping J held that he did not have jurisdiction to entertain

83 Summary Proceedings Act 1957, s 116(1A).

84 Section 5(1) Crimes Amendment Act (No 2) 1993.

85 *M v Police* (4/11/92, Tipping J, HC CHC, AP294/92).

an appeal from a man who had been found not guilty and discharged after a trial on indictment in the District Court. The man applied for a final order for name suppression, which was refused. He appealed under section 115C of the Summary Proceedings Act 1957.

- 6.30 Tipping J held that the use of the word “informant” in section 115 indicated it was directed only to summary proceedings and not to proceedings on indictment. He concluded that section 115C covered cases in the summary jurisdiction and indictable cases up to the point of committal. After that, without any express provision giving the High Court a right to consider name suppression matters, he concluded that if any right of appeal existed, it must be under s28D(3) of the District Courts Act 1947, which brought in Part XIII of the Crimes Act 1961 (as it was at that time). He said that whether that in fact empowered the Court of Appeal to consider appeals from name suppression decisions was a matter for the Court of Appeal.
- 6.31 Tipping J said that this subject required urgent legislative attention, noting that if Parliament wanted the High Court to consider name suppression appeals in similar circumstances, it would be necessary to legislate expressly. If it wanted such matters to go to the Court of Appeal, again, express legislative provision would be desirable.
- 6.32 The Crimes Amendment Act (No 2) 1993 was passed the next year. Its reference to the right of either the prosecutor or the applicant to appeal to the High Court from a name suppression order seems to be intended to overcome the difficulties encountered in *M v Police*. In 1994, the High Court heard an appeal from an appellant who was acquitted following a full jury trial on charges of offences of assault on school children.⁸⁶ The District Court judge refused name suppression. The appellant appealed first to the Court of Appeal, but in the words of the decision:⁸⁷
- Later, however, it was appreciated that the amendments made by the Crimes Amendment Act (No 2) 1993 gave jurisdiction to this Court rather than the Court of Appeal in relation to any refusal of an order for suppression in the District Court.
- 6.33 The appeal therefore proceeded on the basis of an appeal under section 115C of the Summary Proceedings Act 1957.
- 6.34 Presumably the intention of the amendment was to retain the High Court’s supervisory jurisdiction over the District Court in the matter of suppression orders. However, the result was that if the appeal from a jury trial involved a conviction and sentence and order refusing name suppression, theoretically the appellant would be required to take the substantive appeal against conviction and sentence to the Court of Appeal, and the appeal against the refusal of a suppression order to the High Court.
- 6.35 This problem may have been resolved by the addition last year of section 115DB of the Summary Proceedings Act 1957, which provides that sections 115 to 115DA are subject to section 384A of the Crimes Act 1961, which allows for the

86 *S v R* (1994) 12 CRNZ 290.

87 *Ibid* 291.

consolidation of appeals where appeals after conviction lie to different courts. The wording of section 384A seems to refer to multiple offences, but may be wide enough to apply to appeals against conviction and sentence in respect of the same offence. We suggest that the clarity of this provision could be improved.

Time for appeals

- 6.36 Crown Law raised some further inconsistencies in the appeal provisions. Appeals under section 115C of the Summary Proceedings Act 1957 must be lodged within three days.⁸⁸ This time limit therefore applies to appeals against suppression orders made in the summary or indictable jurisdiction of the District Court. However, if a suppression order is imposed by the District Court in the indictable jurisdiction on conviction, the prosecution has 28 days to appeal against sentence. It is unclear how these two time frames interact.
- 6.37 Applications to the Court of Appeal for leave to appeal against the grant or refusal of a suppression order before trial must be made within 10 days.⁸⁹

Appeals in case of acquittals

- 6.38 In the High Court, at any time before the trial, either the prosecutor or the accused may appeal with leave of the Court of Appeal under section 379A1(ba) of the Crimes Act 1961. After trial, appeals are governed by section 383(1)(b) of the Crimes Act 1961, which provides that after conviction or sentence, any person convicted on indictment may appeal to the Court of Appeal (or, with leave of the Supreme Court, to that court), against sentence. "Sentence" includes any order of the court made on conviction, and so includes suppression orders.⁹⁰ The Solicitor-General may appeal against the sentence with leave.⁹¹
- 6.39 Where the accused is acquitted in the High Court but an application for name suppression is *refused*, there is no jurisdiction for the Court of Appeal to hear an appeal against the refusal to order suppression of name under section 383 of the Crimes Act 1961, as that section relates only to appeals against conviction or sentence.⁹² If the trial took place in the District Court, the acquitted person would have a right of appeal under section 115C of the Summary Proceedings Act 1957.
- 6.40 In our view, where a person is acquitted in the High Court but name suppression is refused, he or she should be entitled to appeal that decision, with leave of the Court of Appeal.

88 Summary Proceedings Act 1957, s116(1A).

89 Crimes Act 1961, s 379A(ba) and s 379(4).

90 *R v Liddell* [1995] 1 NZLR 538 at 544.

91 Crimes Act 1961, s383(2A).

92 *R v B* (21/4/05, CA4/05 Hammond, Robertson & Potter JJ).

Orders made in the course of a trial

6.41 In the Issues Paper we discussed the fact that the Court of Appeal only has jurisdiction to hear appeals from pre-trial or post-trial orders, rather than orders made in the course of a trial. The rationale is to prevent the conduct of trials being unduly delayed by appeals. However, 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. There is no bar on appeals against name suppression orders during the course of a trial in the District Court's indictable jurisdiction: an appeal would lie to the High Court under section 115C of the Summary Proceedings Act 1957.

6.42 Most submitters supported the idea of appeals from suppression orders made during a trial. However the News and Current Affairs Department of Television New Zealand sounded a note of caution:

The ability of the media to be able to publish or broadcast information contemporaneously with its newsworthiness is an integral part of the principle of freedom of expression. This has been acknowledged by the courts in cases such as *R v Burns (Travis)* [2002] 1 NZLR 387 at 407. The Court of Appeal in England has also accepted that an important aspect of freedom of expression is that "one should be not only able to publish what one wishes but also to do so when one wishes." *Ex parte The Daily Telegraph Plc & Ors* [2001] 1 WLR 1983, 1990, paragraph 16.

An appeal right in the course of trial against dismissal of name suppression would potentially have a significant effect on open justice and media reporting, and therefore requires careful scrutiny. This is particularly so because appeals are likely to be brought for strategic reasons, regardless of the merits of the appeal.

6.43 Fairfax Media said there should be a right of appeal from suppression orders made during a trial, but submitted that the appeal process should be fast-tracked, given that contemporaneous timing is a business imperative for journalists when considering whether a story is worth publishing:

If an appeal process takes a number of weeks/months, the appeal process itself could be seen to undermine the open justice principle.

6.44 In our view there should be a right of appeal against suppression orders made during the course of a trial, provided that the trial should not be suspended pending the outcome of that appeal.

STANDING OF MEDIA

Standing at first instance

6.45 The news media have the right to seek an audience and be heard on the question of suppression.⁹³ In *R v L*, the court described this right as arising from the High Court's inherent jurisdiction.⁹⁴ In that decision the court expressed doubt as to whether the media would have standing in respect of suppression orders in the District Court, as it is not a court of inherent jurisdiction, but in fact decisions since that time seem to have accepted that the media should be heard on applications for suppression in the District Court as well. In *Lewis v Wilson &*

93 *R v L* [1994] 3 NZLR 568; *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, para 50.

94 *R v L*, *ibid*.

Horton Ltd, for example, the Court of Appeal assumed that the media would have standing to be heard in the summary jurisdiction on an application under section 140 of the Criminal Justice Act 1985, although it was concerned about the effect that might have on a busy list court.⁹⁵

- 6.46 The right of the media to be heard on suppression applications is well established in the New Zealand courts. We do not consider that there is any need to codify that right by setting it out in legislation. In practice, it is a right that will be exercised relatively rarely, for reasons described by the Court of Appeal in *Lewis v Wilson & Horton*.⁹⁶ The cases which arise will generally be those where the media have had sufficient warning of the matter to be in a position to arrange representation and to give notice that they wish to be heard. That will not typically be the case where an application is made in the summary jurisdiction.

Standing on appeal

- 6.47 Although the media have the right to be heard, they do not have the status of a party in any application for suppression. As a result, they do not have standing to appeal against the grant or refusal of name suppression, as the right of appeal is created by statute, and is confined to the applicant, the informant or the prosecutor. In most cases where a decision is made under section 140, a person who is affected by the decision but who is not a party can seek judicial review of the decision. However, judicial review is different from appeal. An appeal concerns the merits of the decision – was it right or wrong? Judicial review concerns the legality of the decision – is it within the limits of the court’s powers?⁹⁷
- 6.48 Moreover, the High Court, as a superior court, is not subject to judicial review, so judicial review does not assist in challenges to High Court decisions made as a result of an appeal from a grant or refusal of suppression in the District Court. If an application for suppression is refused, and the applicant appeals and succeeds, the media are unable to pursue the matter further, as they have no standing to appeal, and judicial review is not available at this stage.
- 6.49 In the Issues Paper, we asked whether there should be an extended statutory right of appeal for members of the media or other persons with a proper interest in the subject matter of the appeal. There was strong support for the media to have a right of appeal.
- 6.50 Why should the media have status to appeal? Sir John Donaldson’s description of the rationale for the crucial position of a free press is relevant in this context.⁹⁸

It is not because of any special wisdom, interest or status enjoyed by proprietors, editors or journalists. It is because the media are the eyes and ears of the general public. They act on behalf of the general public. Their right to know and their right to

95 *Lewis v Wilson & Horton Ltd* above n 93, para 50, 51.

96 *Ibid.*

97 HWP Wade and CF Forsyth, *Administrative Law* (9^{ed.} Oxford University Press, 2004) 33.

98 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1988] 3 All E.R. 594, 600, per Sir John Donaldson MR.

publish is neither more nor less than that of the general public. Indeed it *is* that of the general public for whom they are trustees.

- 6.51 The media are already given special status in New Zealand in relation to criminal proceedings. Examples include the provision of press benches, and rules allowing the media to remain in court when the general public is excluded.
- 6.52 In our view, the media should have standing to appeal against a decision to make or refuse a suppression order, or a decision varying, revoking or reviewing a suppression order. The current standing of the media in relation to applications for suppression orders recognises that those orders can have significant implications for the ability of the media to report on the administration of justice. We consider that the law should also grant the media the right to be heard on appeals in relation to such orders.
- 6.53 In *Fairfax v C*,⁹⁹ the Court of Appeal did not accept an argument by Fairfax that it should be treated as a party, with a right to appeal in terms of section 144 of the Summary Proceedings Act. The Court of Appeal commented:
- There are other aspects of the criminal justice process in which the media could well claim a right to reflect public concerns, but expanded appeal rights for the media would not sit well with the statutory scheme which sets out in some detail the rights of the various participants in the process. For example, rights of victims to have their views on name suppression taken into account are set out in s28 of the Victims' Rights Act 2002.
- 6.54 We agree that expanding appeal rights is a matter that should be approached with caution. But in our view, a limited extension to allow the media the right to appeal a decision on an application for suppression of name or evidence is justified.
- 6.55 We recommend that the “media” in this context be defined by reference to the criteria discussed in the context of the closing of the court: in other words the appeal right should be extended to members of the media who are subject to a code of ethics and the complaints procedure of the Broadcasting Standards Authority or the Press Council.

Appeal standing for other persons with a proper interest

- 6.56 In the Issues Paper we also asked whether appellate rights should be extended to other persons with a proper interest. The most obvious categories of persons with a proper interest would be witnesses or victims. Presently, their interests are represented by the prosecution, which does have standing to appeal. Submitters were more cautious about extending the right to appeal to other persons with a proper interest, beyond the media and those who already have standing to appeal.
- 6.57 We have concluded that separate standing should not be granted to witnesses and victims in this regard. In practical terms, the names of victims and witnesses are not generally made public at the first call of a matter in the list court. Subsequently, the prosecution will almost always make an application for

⁹⁹ *Fairfax New Zealand Ltd v C* [2008] NZCA 39, para 27.

suppression where necessary. We have suggested that witnesses should be informed of the availability of suppression by the prosecution, in accordance with guidelines, and that prosecution guidelines or an amendment to the Victims' Rights Act 2002 should be used to provide similar information to victims.

- 6.58 We note that victims and witnesses will still be able to bring an action for judicial review themselves if name suppression is refused in the District Court, in the unlikely event that the prosecution does not support an appeal.

RECOMMENDATION

R23 Members of the media who are subject to a code of ethics and the complaints procedure of the Broadcasting Standards Authority or the Press Council should have standing to appeal against a decision to make or refuse a suppression order, or a decision varying, revoking or reviewing a suppression order.

ABILITY TO CHECK THE TERMS OF ORDERS

Register of suppression orders

- 6.59 There was strong support in submissions for a central register of suppression orders, to allow the media to check the terms and status of suppression orders made by the courts. Fairfax noted that the ability of the media to obtain timely and accurate information from the court in relation to the existence, duration and scope of suppression orders varies wildly from registry to registry. The Press Council noted that a central register would help to prevent inadvertent breaches of suppression orders, which feature in a number of complaints it has heard. Several submitters suggested that the ideal would be to have a national electronic register of suppression orders accessible to the news media.
- 6.60 The Ministry of Justice is continuing to explore ways in which the Ministry and/or courts registry staff can provide timely information on the existence and terms of suppression orders. During consultation we heard of judges and courts adopting practices for particular cases to ensure that the media are kept up to date with orders: for example members of the media may be invited to provide their business cards, and details of any orders issued during the trial will be forwarded to them as they are made. While such initiatives are to be encouraged, a more general and long-term solution meeting the need of journalists not present in the courtroom, or writing after a trial, would be highly desirable.
- 6.61 In the Issues Paper we referred to the register of suppression orders operating in South Australia.¹⁰⁰ 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. The notice contains

¹⁰⁰ 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.

details of the type of order, its number, the name of parties, the file number, court, location, charges, presiding officer, date and terms of order, details to be suppressed and full particulars of the reasons for the order.¹⁰¹

- 6.62 The register is open to members of the public, as well as the media. Currently the register is available in hard copy only, but a project is underway to have it in electronic format, accessible by a kiosk arrangement.
- 6.63 The Sheriff told us that the process is not demanding of time or resources for the Sheriff's Office, as long as the suppression orders are completed accurately by the judge's associate or the magistrate's clerk. The only issues that arise are when the documents are not completed in full, and staff at the Sheriff's Office have to make further inquiries.
- 6.64 In Scotland, the Court Announcements page on the Scottish Courts' website provides information about orders postponing publication of reports made under section 4(2) of the Contempt of Court Act 1981.¹⁰² The website lists the case name, date and court, and provides telephone and fax details of the relevant court offices where the terms of the order can be obtained. When a judge makes an order, the clerk fills in a form and sends it electronically it to a central point. An email is then immediately sent to all the main media legal advisors and editors to inform them that the order has been made, and the details described above are placed on the website, where they remain. The Scottish Courts Service advises that the system works very well.¹⁰³
- 6.65 We endorse the Ministry of Justice's ongoing efforts to improve systems for ensuring the media have timely and reliable information about the existence of suppression orders and their terms. We recommend that this work be given high priority.

RECOMMENDATION

R24 The development of a national register of suppression orders should be advanced as a matter of high priority.

Standard form orders

- 6.66 In the Issues Paper, we suggested that it might be useful, at least in the context of orders for suppression of name, to create some standard form orders, with accompanying standard form endorsements, for use by the courts in unexceptional cases. This would avoid some of the practical problems that have arisen in the past where the exact terms of the order are unclear, or the endorsement does not reflect the terms of the order.
- 6.67 This suggestion drew widespread support from submitters. Several also suggested that judges should sign off the endorsements, to ensure that they adequately reflect the terms of the order.

101 Information provided by email from Mark Stokes, Sheriff, South Australia, dated 16 March 2009.

102 http://www.scotcourts.gov.uk/current/court_announcements.asp (accessed 1 July 2009).

103 Email from Elizabeth Cutting, Public Information Officer, Supreme Court, Edinburgh, dated 14 March 2009.

6.68 This is not a matter that is suited to being dealt with by a statutory provision. It may be that the judiciary consider it more appropriate to include some standard form suppression orders for use in unexceptional cases in the judicial Bench Books.

INABILITY TO REVISIT ORDERS

6.69 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.¹⁰⁴ 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 140.¹⁰⁵ However, the District Court does not have jurisdiction to discharge or review a final suppression order, in the absence of statutory authority.¹⁰⁶ In our view the powers set out in the legislation to review orders for the suppression of name or evidence should be consistent. There was widespread support for this view from submitters.

6.70 The Criminal Law Committee suggested that introducing such a power in relation to section 140 might pose problems for judicial comity as it might allow one District Court judge to overturn the decision of another. However, the District Court already has this power of review under section 138(2)(a) or (b): we are only proposing that the powers should be consistent. Such a power is highly unlikely to be exercised unless there has been a change of circumstances.

RECOMMENDATION

R25 The same legislative right of review should apply to the courts' powers to review orders for the suppression of name and evidence.

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

105 *R v Burns* (23 August 2000) HC AKLD T991986, Chambers J, paras 25 – 26.

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

Chapter 7

Publication and the Internet

INTERNET

Challenges posed by the Internet

- 7.1 In the Issues Paper, we discussed how far the existence of material on the Internet, or the risk of its publication on websites, should affect orders made by the courts.
- 7.2 In a submission in response to the Issues Paper, Judge Harvey described some of the challenges posed by Internet based information to the justice process:
- The information is constantly available and may, even if with some difficulty, invariably be located;
 - The information retains its “fresh” quality;
 - In criminal investigations in particular, the information will be of a developing nature based upon reports as investigation progresses. Although the evidence at court presents the final picture, the “colour” of that evidence could be affected by reference to developing investigation information;
 - Internet based information challenges the *practical* obscurity that has previously been a characteristic of traditional news media – electronic information on the Internet is readily available, and easily searchable, as opposed to hard copy information held in a central location, and searchable only in limited ways;
 - Internet based information also challenges the *partial* obscurity that has previously characterised traditional news media, whereby the information was at some stage in the public arena, but is subsequently remembered only in part, with the details rendered obscure;
 - The information may be quickly relocated to a vast number of websites.
- 7.3 To these we add another feature: because the Internet allows anyone to be a publisher of information, information may be widely published, copied and further published on the Internet even if it is inaccurate or unreliable. While inaccuracy is not a problem confined to the Internet, the speed of dissemination of information on the Internet means that inaccurate information, once published, may be almost impossible to correct.

- 7.4 These features have some specific results for the justice system, particularly in relation to the risk of prejudice to a fair trial. In the past, where publicity about a trial took place in the traditional print, radio and television media, the effect of that publicity on potential jurors could be diluted by the passage of time, and by practical and partial obscurity. Today, such publicity remains as fresh and available the day before a trial starts as it was a year earlier.
- 7.5 In the Issues Paper, we asked for views as to whether the risk of jurors obtaining information about an accused or a trial on the Internet suggests the need for greater use of pre-trial suppression orders. Almost all submitters who responded to this question said no; one submitted that this should be a question for the judge in each case.
- 7.6 In our view, the longevity of information on the Internet may well require the court in a given case to think differently about the risk of prejudice to a fair trial when making orders for suppression of evidence. In some cases it may provide a greater reason to suppress evidence where there is a risk of prejudice to a fair trial, as the court can no longer rely on the passage of time to remove the details from the minds of potential jurors. However, we agree that this should be a question for the judge in each case, rather than suggesting a general need for greater use of pre-trial suppression orders. As the Court of Appeal noted in *R v B*,¹⁰⁷ 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.
- 7.7 The speed with which information can be posted on the Internet from a remote location may also require counsel and judges to think differently about the timing of applications for orders for suppression.

Research by jurors

- 7.8 Many of the concerns voiced about the impact of the Internet on trials relate to the question of jurors making their own inquiries generally, rather than to concerns about their finding suppressed information on the Internet. For example, jurors might research matters of evidence, such as information about patent cases, or medical issues, or other matters that should be decided only on evidence presented to the court. Information about previous convictions of a defendant may appear from earlier news articles or on other websites. In *R v Harris*, court officers found pages printed from a United States Internet site in the jury room. The information described “beyond reasonable doubt” and “burden of proof” in a way that did not reflect New Zealand law.¹⁰⁸ None of this information would have been any less readily available by increased use of suppression orders.
- 7.9 As the Issues Paper explained, the view expressed by the New Zealand courts in recent cases has been that in their experience jurors, faced with the actuality of trial, focus on the evidence presented to them in court and conscientiously

¹⁰⁷ *R v B* [2008] NZCA 130 para 79.

¹⁰⁸ *R v Harris* [2006] NZCA 273. This was despite the Judge having advised the jury that they were not to research any of the topics that arose in the trial, particularly not on the Internet. The Judge issued a further warning in strong terms to the jury when the material was found. The Court of Appeal rejected an argument that the subsequent conviction of the appellant was unsafe because of juror misconduct.

approach their task including following judicial directions.¹⁰⁹ If it becomes apparent that this confidence is misplaced, that raises wider questions about the jury process that cannot be resolved by generally increasing the use of pre-trial suppression orders.

- 7.10 One option raised in submissions was the possibility of making it a criminal offence for jurors to conduct their own research. We note that juror research and investigations has been a serious criminal offence in New South Wales since 2004.¹¹⁰ In a recent consultation paper, the New South Wales Law Reform Commission noted that the criminalisation of juror misconduct applied for nine of the ten trials reviewed in a New South Wales pilot jury study, but it did not alter the attitudes of the jurors who agreed that extra-curial investigations could be very acceptable, nor did it stop a juror who was reported by a respondent to have brought inadmissible material into the jury room. However the Law Reform Commission found it notable that in only three of the ten trials in the study did the trial judge tell the jury that it was a crime to engage in private investigations and research.¹¹¹
- 7.11 The question of criminalisation of juror misconduct raises wider issues that would require close consideration, such as whether it is desirable to penalise people for conduct in the performance of a civic duty. These issues should be considered in the context of jury trials generally if it becomes apparent that such an investigation is necessary, rather than in relation to suppression of names and evidence.

Options for controlling publication on the Internet

- 7.12 In the Issues Paper we asked whether the courts should be able to impose suppression orders directed solely at the Internet, and if so, how such orders should be framed. Most submitters answered no to this question. In our view, there is currently no reason a judge cannot impose an order directed solely at the Internet, but we are hard-pressed to envisage a situation in which such an order would be appropriate. If the information is sufficiently prejudicial to warrant suppression on the Internet, why not make a more general order? There is also the problem of the increasing degree of overlap between traditional media and the Internet, and the resulting risk that if suppression orders are directed only at the Internet, the same information published in traditional media might be inadvertently published on the Internet.
- 7.13 Other practical steps have been proposed, such as proactive monitoring of the Internet by court officials to see whether prejudicial material is available on the Internet during a trial.¹¹² Steps could then be taken to have the offending material removed, either by requests to moderators, or by a more formal take down process.

109 *Solicitor-General v Fairfax & Anor* (10 October 2008) HC WGN CIV 2008-485-000705, Randerson and Gendall JJ, para 131.

110 Jury Act 1977 (NSW) s 68C: "(1) A juror for the trial of any criminal proceedings must not make an inquiry for the purpose of obtaining information about the accused, or any matters relevant to the trial, except in the proper exercise of his or her functions as a juror" Maximum penalty: 50 penalty units or imprisonment for 2 years, or both. The section commenced in December 2004.

111 New South Wales Law Reform Commission *Jury Directions* (Consultation Paper 4, Sydney, 2008) para 5.34.

112 <http://www.medialawjournal.co.nz/?p=289> (accessed 31 July 2009).

Removing information in breach of an order

- 7.14 Where a suppression order is breached and suppressed material is made available on the Internet, most submitters considered that there should be a statutory obligation on service providers or content hosts who become aware that they are carrying or hosting an offending publication to take steps within their means to prevent the material from being further published. However, several submitters noted that while they supported an obligation requiring service providers or content hosts to remove offending material from sites they host, it would be impractical to require them to prevent further publication by others.
- 7.15 One suggestion was that there should be a “notice and take down” procedure, requiring providers to expeditiously remove or disable access to material on their systems or networks when they are notified that the material is in breach of a suppression order.
- 7.16 We recommend that where an Internet service provider or content host becomes aware that they are carrying or hosting information that they know is in breach of a suppression order, it should be an offence for them to fail to remove the information or to fail to block access to it as soon as reasonably practicable.

RECOMMENDATION

R26 Where an Internet service provider or content host becomes aware that they are carrying or hosting information that they know is in breach of a suppression order, it should be an offence for them to fail to remove the information or to fail to block access to it as soon as reasonably practicable.

MEANING OF PUBLICATION

- 7.17 In the Issues Paper we asked whether “publication” should be defined in legislation. The courts have said that publication involves publicly disclosing or putting material in the public arena.¹¹³ It is not restricted to publication in the news media.¹¹⁴ We set out our view that as a matter of policy, publication in the context of the Criminal Justice Act 1985 should include word of mouth communications. We asked whether the legislation should define more clearly what publication means. A statutory definition would have the advantage of legal clarity and certainty, but it may extend the ambit of the offence too far. Submitters were divided as to whether a statutory definition should be included, and equally divided as to whether such a definition should include passing information by word of mouth.
- 7.18 We do not recommend including a statutory definition of publication: in our view it may create more problems than it solves. It would be preferable to leave it to the courts to make decisions on a case by case basis, taking a robust approach to the meaning of publication in situations which are clearly not intended to be captured by the Act.

¹¹³ *Solicitor-General v Smith* [2004] 2 NZLR 540.

¹¹⁴ *Television New Zealand v Department of Social Welfare* [1990] 6 FRNZ 303, 305.

THE IN-COURT
MEDIA
COVERAGE
GUIDELINES
2003

- 7.19 The In-Court Media Coverage Guidelines 2003 apply to all proceedings in the Court of Appeal, the High Court, and the District Court.¹¹⁵ 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.
- 7.20 In the Issues Paper, we asked whether the Guidelines should be given greater force and effect, by way of rules or regulations. Submissions suggested that by and large the Guidelines are effective in their current form, and although there was some support for formalising them by way of rules, several submitters suggested that the success of the Guidelines has been due in part to their non-binding nature, where the question of filming remains at the discretion of the presiding judge.
- 7.21 We received some detailed comments from submitters as to matters that they think could be dealt with differently by the Guidelines. We have passed those suggestions on for consideration by the Media in Courts Committee that oversees the operation of the Guidelines. We do not make any recommendations for change to the content or status of the Guidelines.

PUBLICATION
BY POLICE
AND OTHER
OFFICIALS

Section 141

- 7.22 Section 141 of the Criminal Justice Act 1985 provides exceptions to suppression orders that are necessary to ensure that the suppression of an individual's name does not impede the functioning of the justice system in relation to that individual. Nothing in sections 138 to 140 prevents the police publishing or requesting the publication of the name of any person who has escaped from custody or failed to appear in court, if the publication is intended to help in the recapture or arrest of the person.
- 7.23 There are also exceptions for the publication of the name or identifying particulars of any person or the details of the offences charged when that publication is made to anyone assisting with the administration of the sentence imposed on the person, or with his or her rehabilitation, or to members of the police, or officers or employees of the Department of Corrections or of the Department for Courts, who require the information for their official duties.
- 7.24 No concerns were raised during submissions or consultation about this provision. We recommend that a similar provision be set out in the new legislation.

RECOMMENDATION

- R27 The provisions of section 141 of the Criminal Justice Act 1985 should be carried forward into the new legislation.

115 <http://www.justice.govt.nz/media/media-information/in-court-media-coverage-guidelines> (accessed 10 October 2009). The Guidelines resulted from a pilot project approved by the Courts Consultative Committee which began in 1995.

Chapter 8

Contempt, offences and penalties

CONTEMPT

Issues

8.1 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. In the Issues Paper, we suggested that 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. We asked whether it was necessary, given that sections 401 of the Crimes Act 1961 and 206 of the Summary Proceedings Act 1957 appear to cover the situation envisaged by section 138(8).

8.2 Section 206 of the Summary Proceedings Act 1957 provides:

Contempt of Court If any person—

(a) Wilfully insults a District Court Judge or Justice or Community Magistrate or any witness or any officer of the Court during his sitting or attendance in Court, or in going to or returning from the Court; or

(b) Wilfully interrupts the proceedings of a Court or otherwise misbehaves in Court; or

(c) Wilfully and without lawful excuse disobeys any order or direction of the Court in the course of the hearing of any proceedings,—

any constable or officer of the Court, with or without the assistance of any other person, may, by order of the District Court Judge or Justice or Community Magistrate, take the offender into custody and detain him until the rising of the Court, and the District Court Judge or Justice or Community Magistrate may, if he thinks fit, by warrant under his hand, order that the offender be committed to prison for any period not exceeding 3 months, or order the offender to pay a fine not exceeding \$1,000 for each offence.

8.3 Section 401 of the Crimes Act 1961 provides:

Contempt of court (1) If any person—

(a) assaults, threatens, intimidates, or wilfully insults a Judge, or any Registrar, or any officer of the court, or any juror, or any witness, during his sitting or attendance in court, or in going to or returning from the court; or

(b) wilfully interrupts or obstructs the proceedings of the court or otherwise misbehaves in court; or

(c) wilfully and without lawful excuse disobeys any order or direction of the court in the course of the hearing of any proceedings—

any constable or officer of the court, with or without the assistance of any other person, may, by order of the Judge, take the offender into custody and detain him until the rising of the court.

(2) In any such case as aforesaid, the Judge, if he thinks fit, may sentence the offender to imprisonment for any period not exceeding 3 months, or sentence him to pay a fine not exceeding \$1,000 for every such offence; and in default of payment of any such fine may direct that the offender be imprisoned for any period not exceeding 3 months, unless the fine is sooner paid.

(3) Nothing in this section shall limit or affect any power or authority of the court to punish any person for contempt of court in any case to which this section does not apply.

- 8.4 We also asked whether the Criminal Justice Act 1985 should provide expressly for breaches of other orders made under sections 138 – 140 to be treated as contempt of court. Our preliminary view was 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.

Is section 138(8) necessary?

- 8.5 In its submission, the Criminal Law Committee of the New Zealand Law Society suggested there were two possible interpretations of section 138(8). The first is that it could be taken as a statutory award of a power to treat as a contempt a breach of section 138(2)(c) by giving the court an open ended power to punish the contempt along the lines of a superior court exercising inherent jurisdiction. Thus a contempt under section 138(2)(c) could in theory invoke a greater penalty than a contempt under section 206 of the Summary Proceedings Act 1957 or section 401 of the Crimes Act 1961.
- 8.6 The second interpretation is that section 138(8) is intended to work in conjunction with section 206 and section 401. We agree with the committee's conclusion that this interpretation makes the most sense.
- 8.7 In our view, section 206 of the Summary Proceedings Act 1957 and section 401 of the Crimes Act 1961 apply to breaches of section 138(2)(c) in any event. Section 138(8) is not necessary, other than acting as a reminder to the judge that there is power to take immediate action against a person who breaches an order to clear the court. We recommend that section 138(8) should be repealed and not replaced.

Are further statutory contempt powers required?

- 8.8 The statutory contempt powers set out in section 206(c) of the Summary Proceedings Act 1957 and section 401(1)(c) of the Crimes Act 1961 are confined to breaches of court orders that occur “in the course of the hearing of any proceedings”. Our reading of these provisions is that they are therefore confined to matters that occur in court, during the hearing. They could not be used to deal with breaches of a suppression order that occur before or after the trial, nor could they be used during the trial to deal with breaches of suppression orders that occur outside the court room (for example, breach of a name suppression order by publication in a newspaper).
- 8.9 Some of these breaches may still amount to common law contempt. A breach of a District Court suppression order could be brought before the High Court in its supervisory jurisdiction.
- 8.10 The Criminal Law Committee of the New Zealand Law Society submitted that the District Court, at least in its indictable jurisdiction, should have the power to deal with breaches of suppression orders as contempt of court, and that a statutory framework should be enacted to allow for this.
- 8.11 However, most submitters did not consider that there should be further statutory contempt powers to deal with breaches of suppression orders.
- 8.12 We agree that the present framework creates some inconsistencies between the powers of the District Court in its indictable jurisdiction and the High Court. However, we are not convinced that these warrant the creation of a new statutory contempt framework. We consider it would be preferable to continue to deal with breaches of suppression orders by way of specific offence provisions, with the exception of breaches of an order to clear the court, where adequate statutory contempt powers already exist.

Assaults and threats

- 8.13 Section 206(a) of the Summary Proceedings Act 1957 provides that a person may be detained, and imprisoned or fined if he or she “wilfully insults” a District Court judge, justice, community magistrate, witness or any officer of the court. Section 401(1)(a) of the Crimes Act 1961 provides for the same result if a person “assaults, threatens, intimidates or wilfully insults” a judge, registrar, an officer of the court, any juror or any witness.
- 8.14 In its submission, the Criminal Law Committee of the New Zealand Law Society noted that there appears to be no sound reason for the differences between section 206(a) of the Summary Proceedings Act 1957 and section 401(1)(a) of the Crimes Act 1961.
- 8.15 Assault and threats are offences that may be prosecuted and, if proved, punished under the criminal law. We believe it would be preferable for those matters to be dealt with by the ordinary criminal process, rather than by way of contempt. The terms of section 401(1) would allow a person who assaults a juror, for example, to be taken into custody, imprisoned or fined without the benefit of a trial or any of the other protections that would attach if he or she were charged under the criminal law.

- 8.16 We recommend that sections 206(a) of the Summary Proceedings Act 1957 and section 401(1)(a) of the Crimes Act 1961 should be replaced by a provision in the new Criminal Procedure Bill, drafted in terms of section 206(a), rather than section 401(1)(a).

RECOMMENDATION

R28 Section 138(8) of the Criminal Justice Act 1985 should be repealed and not replaced.

RECOMMENDATION

R29 Sections 206(a) of the Summary Proceedings Act 1957 and section 401(1)(a) of the Crimes Act 1961 should be replaced by a provision in the new Criminal Procedure Bill, drafted in terms of section 206(a), rather than section 401(1)(a).

OFFENCES

Strict liability

- 8.17 A person who breaches a suppression order imposed 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.¹¹⁶ 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?¹¹⁷
- 8.18 Most submitters considered that breaching a suppression order should continue to be an offence of strict liability. We agree with this view: it allows the provisions to operate without being defeated by difficulties of enforcement, while leaving open a defence of total absence of fault.
- 8.19 In the Issues Paper we discussed the possibility of creating a system of tiered offences and matching penalties, to cover both unintentional and intentional breaches of suppression orders. However, we recommend that rather than establishing tiered offences, which requires the court to consider culpability as an essential element of the offence, it would be preferable to simply increase the available penalties and leave culpability to be taken into account by the sentencing judge. If 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.

RECOMMENDATION

R30 Breaches of suppression orders should 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 with total absence of fault.

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

117 *Karam v Solicitor-General* (20 August 1999) HC AKL AP 50/98, Gendall J, 7.

"JIGSAW IDENTIFICATION"

- 8.20 Section 140 of the Criminal Justice Act 1985 empowers a judge to make an order prohibiting the publication of the name, address or occupation of a person, or of any particulars likely to lead to that person's identification. Section 140(5) of the Criminal Justice Act 1985 makes it an offence to commit a breach of any order made under section 140, or to evade or attempt to evade any such order.
- 8.21 While judges are empowered to specifically prohibit publication of identifying particulars, it is common for an order under section 140 to simply prohibit the publication of the name of the person. In that case it is an offence to publish the name or "to evade or attempt to evade the order". It is unclear exactly what this means.
- 8.22 Concerns were raised about "jigsaw identification" in submissions and consultation. The Press Council noted that where different media outlets describe an accused by small but differing features, the combined effect may build up a picture which allows the public to identify the person. Can any one media outlet be said to have breached the order? Can any one outlet be said to have attempted to evade the order?
- 8.23 Before 1985, the statutory formulation under section 46 of the Criminal Justice Act 1954 did not include reference to evading or attempting to evade an order. Instead, where the publication of any person's name was prohibited, it was not lawful to publish that person's name, *or any name or particulars likely to lead to their identification*.
- 8.24 We consider that using a similar statutory formulation in relation to name suppression offences will help reduce the risk of jigsaw identification. If a name is suppressed, it should be unlawful to publish that person's name, or any particulars that are likely (either alone or in conjunction with other information already in the public domain) to lead to the person's identification.
- 8.25 We acknowledge that this may mean that the media need to consider the way in which they report cases involving name suppression even more carefully. As at present, any person charged with breaching an order will have a defence if he or she acted honestly and with due diligence.

RECOMMENDATION

R31 Where a name is suppressed, it should be unlawful to publish that name, or any particulars that are likely (either alone or in conjunction with other information already in the public domain) to lead to the person's identification.

PENALTIES

- 8.26 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 \$1000.
- (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 \$1000.¹¹⁸

¹¹⁸ Crimes Act 1961, s 401.

(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 \$1000. A body corporate is liable to a fine not exceeding \$5000.

8.27 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 1974.¹¹⁹ The other penalty provisions have not been amended since 1985. Name suppression provisions in other, more recent, legislation carry much heavier penalties.¹²⁰

Adequacy of penalties

8.28 We consider that the present penalties are inadequate, and should be increased. In 2008, the High Court urged Parliament to consider a substantial increase in the fines available for breaches of a suppression order, so that prosecution of offenders was a meaningful deterrent.¹²¹

8.29 In the Issues Paper, we recommended that penalties for breaches of suppression orders should be consistent with those set out in clause 171 of the Search and Surveillance Powers Bill, which at that time provided 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. Those penalties have now been increased in the Search and Surveillance Bill subsequently introduced into Parliament to allow for six months imprisonment in the worst class of case, or \$100,000 in the case of a body corporate.

8.30 We recommend that the maximum penalty for breaches of suppression orders should be six months imprisonment, or \$100,000 in the case of a body corporate. The maximum would be directed at a knowing breach, which is part of a pattern of similar conduct, having major ramifications for the administration of justice, for example resulting in the abandonment of a number of trials.

8.31 As we noted in the Issues Paper, if the penalties for a breach of suppression orders are increased, 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.

RECOMMENDATION

R32 The penalties for breaches of suppression orders should be increased to the level proposed in clause 171 of the Search and Surveillance Bill 2008.

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

120 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.

121 *Solicitor-General v Fairfax (New Zealand Ltd) & Anor* (10 October 2008) HC WGN CIV 2008-485-000705, Randerson and Gendall JJ, para 138.

DIVERSION

- 8.32 In the Issues Paper we noted that both judges and reporters had suggested that it would be useful to consider how name suppression applies where a person has been offered diversion by the police. Name suppression is not automatic in cases of diversion, although 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.
- 8.33 There was little support in submissions for a legislative amendment to the effect that name suppression should follow automatically on diversion. We adhere to the view expressed in the Issues Paper that publication does not defeat the aims of diversion in every case. Questions of permanent name suppression following diversion should be considered on a case by case basis. We recommend that suppression should not follow automatically on completion of diversion.

RECOMMENDATION

R33 Suppression should not follow automatically on completion of diversion.

REGISTRAR'S POWERS

- 8.34 In the Issues Paper, we set out the view that while it may have administrative advantages, the registrar's current power under section 36(1B) of the Summary Proceedings Act to make a permanent order under section 140 of the Criminal Justice Act where an information has been withdrawn and the informant agrees to the making of the order is misconceived. The reasons are the same as those set out at paragraph 6.3: the informant in this situation has no interest in the decision, and in practice the police usually take a neutral position on the application, rather than consenting. We recommend that section 36(1B) of the Summary Proceedings Act 1957 should be repealed. Where issues of permanent name suppression arise upon the withdrawal of a charge, the matter should be referred to a judge.

RECOMMENDATION

R34 Section 36(1B) of the Summary Proceedings Act 1957 should be repealed.

ALCOHOL OR DRUG-RELATED OFFENCES

- 8.35 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 sections 138 or 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 62.¹²² Special reasons can attach to the offender as well as to the offence.

122 These offences are: s 56 – contravention of specified breath or blood-alcohol limit; s57 – contravention of specified breath or blood-alcohol limit by person younger than 20; s 58 – contravention of s12 (persons not to drive while under influence of alcohol or drugs); s 59 – failure or refusal to remain at specified place or to accompany enforcement officer; s 60 – failure or refusal to permit blood specimen to be taken; s 61 – person in charge of motor vehicle causing injury or death; s 62 – causing injury or death in circumstances to which section 61 does not apply. From 1 December 2009, these offences will also include s 57A (driving while impaired and with blood that contains evidence of use of controlled drugs or prescription medicine) – Land Transport Amendment Act 2009, s 7.

8.36 The threshold created by section 66 is high: something out of the ordinary or even exceptional is required.¹²³ In the Issues Paper we queried the singling out of these offences for special treatment in relation to name suppression. In submissions, the Criminal Law Committee of the New Zealand Law Society asked why other, more serious, offences are not given a similar priority.

8.37 We have now proposed that the grounds for name suppression should be specified in the legislation, and that ordinary or even undue hardship to the accused will not be enough to justify name suppression. This should render section 66 of the Land Transport Act 1998 unnecessary in most of the circumstances in which it is currently used, as it will require the accused to cross a similarly high threshold. There may be rare cases in which section 66 would set a higher standard – for example if an application for name suppression is granted on the grounds of undue hardship to a victim, but in our view, in such cases the higher threshold set by section 66 is inappropriate.

RECOMMENDATION

R35 Offences under section 56 to 62 of the Land Transport Act 1998 should not be treated differently in name suppression terms than other offences.

¹²³ *Croad v Hughes* (1994) 12 CRNZ 364, *Ferris v Police* (28 November 2007) HC INV CRI-2007-425-41, Chisholm J.

Appendix



Appendix

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.

139A 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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