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Name Suppression until Conviction:

*An argument in support of a return to s 45B of the
Criminal Justice Act 1954*

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Abstract

A cornerstone of New Zealand's justice system is the principle of "open justice". The courts are open to the public and the media is free to report on proceedings. The by product of this is the presumption against name suppression being granted, particularly in the criminal jurisdiction. This however was not always the case and for ten months between September 1975 and July 1976 blanket suppression of an accused's name and identifying particulars until conviction, was a reality.

This paper argues that a return to legislation of that kind is warranted particularly in light of the changing media landscape which includes instantaneous media reporting and the permanent effect of the internet. This author concludes that a return to liberal name suppression laws would not equate to an unjustified limitation on the freedom of expression, nor would it erode the principle of open justice.

Word length

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I Introduction

It is generally accepted that the public have a legitimate interest in being informed of the identity of any person found guilty of committing an offence, and also that the publicity attached to a court appearance is an important element in the effective operation of a criminal law based on a system of sanctions. Neither of these propositions is relevant if the person charged is innocent.

Patricia M Webb
Criminal Law Reform Committee, 1972

It was this rationalisation that led Ms Webb to recommend, in a minority opinion, that legislation be enacted that prohibited the publication of the name or identifying particulars of “any person charged with a criminal offence unless and until a conviction was entered”.¹ This somewhat radical suggestion was adopted for a ten month period in 1975/76. This paper argues that legislation of its type should be re-enacted particularly in light of the changing media landscape.

The opposition argument rests on the assumption that the “starting point must always be ... freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as ‘surrogates of the public’”.²

In this paper the opposition arguments are addressed by exploring the history of New Zealand’s name suppression laws, followed by an assessment of the right to freedom of expression and what a demonstrably justified limitation could include. A critical examination of the principle of open justice is undertaken with reference to its origins, what it truly requires and how the media plays its role in upholding the idea that justice should not only be done but be seen to be done. The presumption of innocence is briefly discussed to assess its place in the consideration of name suppression applications. The laws of Germany and in particular the value placed on personality protections are explored with a view to the efficacy of such an approach in New Zealand.

This paper concludes that the opposition arguments to the liberalisation of name suppression laws, particularly the premium placed on open justice, lack substance when closely examined. In short, legislation that provides blanket name suppression until conviction, is both a demonstrably justified limitation on the right to freedom of expression and is urgently required to address the changed media landscape.

¹ Criminal Law Reform Committee *The Suppression of Publication of Name of Accused – Statement of Views by Ms Patricia Webb* (September 1972) at 2.

² *R v Liddell* [1995] 12 CRNZ 458 (CA) at 466.

II Legislation

In comparison to other western jurisdictions, New Zealand has been described as arguably having one of the most “liberal litigation-related name suppression policies in the Western world”³ and in anticipation of the Criminal Procedure Act as:⁴

... primed to create the proper balance between privacy, fairness and open justice by balancing factors such as reputation, prejudice and the public good. It is poised to be more objective and predictable than the previous act, while still being humane, with a focus on hardship to individuals.

Despite this comparative view, New Zealand still has a tendency to place greater emphasis on the rights of the media and general public above that of the individual accused.

A Pre-Criminal Procedure Act 2011 (“the 2011 Act”)

Under the Criminal Justice Act 1954 (“the 1954 Act”) the courts were empowered, at their discretion, to prohibit the publication of the name of the “person accused or convicted of the offence, or the name of any other person connected with the proceedings”.⁵ It has been stated that this power was used widely by the courts but not consistently with some magistrates reluctant to use the power at all and some using it all too readily.⁶

In order to achieve some uniformity of approach it was recommended, in 1972, by a majority of the Criminal Law Reform Committee,⁷ that legislation be passed “requiring suppression of publication of the name of the accused and of any particulars that might identify him until the case is gone into”.⁸ The rationale behind this recommendation was the recognised effect on a person of simply being accused of a crime. The Criminal Law Reform Committee noted:⁹

When a person is accused of a crime, the mere accusation and attendant publicity usually affect his reputation adversely, and the effect can range from mild

³ Candice Lazar “New Zealand’s Litigation-Related Name Suppression Policies: A Workable Model for The United States” (2012) 20 U. Miami Int’l & Comp. L. Rev. 59 at 60.

⁴ Ibid at 91.

⁵ Criminal Justice Act 1954, s 46(1); an exception to this general rule was for persons accused or convicted of the offence who had previously been convicted of any offence punishable by imprisonment. Section 46(2) additionally stated that “where the publication of any person’s name is prohibited under this section, it shall not be lawful to publish that person’s name, or any name *or particulars likely to lead to identification* of that person” [emphasis added].

⁶ Criminal Law Reform Committee, above n 1 at 4.

⁷ A committee made up of the Solicitor-General as Chairman and nine other members drawn from the legal profession, department of government and from university law faculties (see Michael Stace “Name Suppression and the Criminal Justice Amendment Act 1975” Brit. J. Criminal. Vol 16 No. 4 (October 1976)).

⁸ Criminal Law Reform Committee, above n 1 at 10; “gone into” meaning until “the prosecution presents its case or the accused pleads guilty”.

⁹ Criminal Law Reform Committee, above n 1 at [1] to [3].

embarrassment to ostracism ... the harm which may be done is not wholly repaired when the accused is acquitted ... the fact of acquittal may receive much less publicity ... [and] an acquittal will not always be regarded as establishing that the accused was innocent.

The dissenting opinion, given by Ms Patricia Webb,¹⁰ went one step further and recommended that “it ought not to be permissible, in any report of criminal proceedings ending in an acquittal, to disclose the identity of the person charged”;¹¹ meaning that “no defendant’s identity could be disclosed till the end of the trial”.¹²

Whilst this recommendation was not immediately adopted, in 1974 when the Labour Government was considering a Bill involving the abolition of the sentence of borstal training, it received a report back from the Statutes Revision Committee (“the Committee”) which recommended that provisions relating to name suppression be extended to include all persons prior to conviction. This proved to be a divisive recommendation and faced with strong opposition the Government referred the matter back to the Committee for further consideration. A number of submissions were received which were evenly for and against the proposed extension and where: ¹³

... the principle concern of the supporters of the measure was the individual accused of an offence. On the other hand, the opponents considered that society’s right to knowledge was more important than the individual’s well-being.

Ultimately the recommendation was adopted and the 1954 Act was amended to include section 45B which prohibited the publication of the name of an accused person or any particulars likely to lead to that person’s identification:¹⁴

... unless and until that person [was] found guilty of the offence with which he [was] charged, or of any other offence of which he [was] liable to be convicted in the proceedings, and a conviction [was] entered against him by the Court.

¹⁰ The then Chief Legal Advisor at the Department of Justice.

¹¹ Criminal Law Reform Committee, above n 1 at 2.

¹² Ibid.

¹³ 32 submissions were received, with 16 submissions in support of the proposed extension; see Michael Stace “Name Suppression and the Criminal Justice Amendment Act 1975” *Brit. J. Criminal.* Vol 16 No. 4 (October 1976) 395 at 396 and 399.

¹⁴ Criminal Justice Act 1954, s 45B; exceptions included the right of the accused to apply for an order permitting publication of his name (s 45B(2)); that the court may permit publication upon its own motion, upon the application of the prosecutor, or upon the application of a member of the public who considers himself/herself prejudiced in some way by non-publication. Before allowing publication the court must consider; the nature of the charge, any special circumstances of the case, the possibility of further evidence being offered, the stage the proceedings have reached, and any other relevant matters (s 45B(3) and (6)); and that the name of an accused who escapes custody or fails to attend court may be published (s 45D).

Section 45B was described as a section with no precedent in Anglo-American legislation and one “which attempts to alleviate the community’s ability to impose the status of deviant upon one specific group”.¹⁵ The National Party remained opposed to the legislation and upon being elected in November 1975 the swift lifespan of section 45B was confirmed with repeal of the section taking place ten months after it came into effect.¹⁶

The next significant change in criminal law came by way of the Criminal Justice Act 1985 (“the 1985 Act”)¹⁷ which again granted the judiciary discretionary powers bearing in mind the general presumption against name suppression. Section 140 of the 1985 Act empowered the courts to prohibit the publication of: “... the name, address or occupation of the person accused or convicted of the offence ... or any particulars likely to lead to any such person’s identification”.¹⁸ The courts were reluctant to fetter this discretion with the Court of Appeal commenting that “the room that the Legislature has left for judicial discretion in this field means that it would be inappropriate for this Court to lay down any fettering code”.¹⁹

This discretion allowed the courts to grant name suppression in a wide variety of cases with the courts increasingly drawing attention to the competing principles of open justice, freedom of expression, the right to a fair trial and the presumption of innocence. In *X v New Zealand Police* Baragwanath J, perhaps foreshadowing what was to come, commented:²⁰

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

In a later case, Baragwanath J went further and stated:²¹

While the starting point is openness, the primary reason for that prior to trial is to ensure that there is due process in court. The presumption of innocence means that if there is significant reason to consider that the defendant may be unfairly prejudiced by refusal

¹⁵ Michael Stace, above n 13 at 395.

¹⁶ Criminal Justice Amendment Act 1976, s 2(1). It has been said that this swift repeal was also due in part to charges being laid against a Government MP regarding an offence involving two boys who had been invited to his motel room for a drink. Whilst the charges did not survive post-depositions stage, the problem was that whilst the charges were before the court, almost all of the “very finite pool of male Government MP’s” determined it necessary to make statements that they were not the MP charged with the offending which somewhat diluted the effect of s 45B (see <https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-844/that-was-the-law>)

¹⁷ Which came into force on 1 October 1985.

¹⁸ Criminal Justice Act 1985, s 140.

¹⁹ *R v Liddell*, above n 2 at 466.

²⁰ *X v New Zealand Police* HC Auckland CRI 2006-404-259, 10 August 2006 at [8].

²¹ *R v B* [2008] NZCA 130 at [57].

of orders under ss 138 or 140, the onus will pass to the prosecution to show why orders should not be made ...

Regretfully it was precisely the discretion left open to the courts which led to the changes made under the 2011 Act. In a 2009 Law Commission Report it was noted that the present broad discretion under s 140 did not provide 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”.²²

B The Criminal Procedure Act 2011

S 200 of the 2011 Act empowers the courts to prohibit the “publication of the name, address, or occupation of a person who is charged with, or convicted or acquitted of an offence”,²³ only if the court is satisfied that publication would be likely to –

- (a) cause extreme hardship to the person charged with, or convicted of, or acquitted of the offence, or any person connected with that person;²⁴

The test for “extreme hardship”²⁵ is not defined in the legislation but the courts have settled on the following:²⁶

A very high level of hardship connoting severe suffering or privation and requiring a comparison between hardship contended by [the appellant] and the consequences normally associated with publication.

It might be argued that the 2011 Act has simply legislated what was already occurring at common law, given that the judiciary retains the discretion to assess what connotes “extreme hardship”, however recent case law clearly evidences the significant change brought about by the new Act. In *Tabb v R* the High Court dismissed an appeal against a refusal to grant pre-trial name suppression to a woman who had been charged with assault with a weapon. The woman submitted that suppression of her name would protect her legal business and thus her

²² Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009) at 8.

²³ See section 211 of the 2011 Act which makes it an offence to publish the name, address, occupation or “other information in breach of a suppression order”, which envisages orders under s 200 being broader than merely the name, address and occupation of a defendant.

²⁴ This paper focuses on “extreme hardship” but s 200(2) of the 2011 Act also allows for name suppression if publication would be likely to “(b) cast suspicion on another person that may cause undue hardship to that person; or (c) cause undue hardship to any victim of the offence; or (d) create a real risk of prejudice to a fair trial; or (d) endanger the safety of any person; or (f) lead to the identification of another person whose name is suppressed by order or by law; or (g) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or (h) prejudice the security or defence of New Zealand”.

²⁵ It is worth noting that the Criminal Bar Association and the New Zealand Law Society, in submissions made during consideration of the Criminal Procedure (Reform and Modernisation) Bill, considered “extreme hardship” to be putting the test too high and recommended a test of “undue hardship” with a meaning more akin to “serious”.

²⁶ *DP v R* [2015] NZCA 476 at [6].

ability to care for her two young children, aged 5 and 10 years respectively. The Court commented:²⁷

I have some real sympathy for Ms Tabb, as I think the full facts explain, if not justify, the full context, including exculpatory factors for the alleged offending, even if it is proven. I am also of the view that publication would have a disproportionate effect and to my mind the pre-act case law would have supported pre-trial suppression. But the threshold test I am confronted with is “extreme harm”. In this case the harm to Ms Tabb does not cross that threshold. While there may be temporary harm of a potentially significant kind, it will not be in my view permanent and of such a nature as to irreversibly damage her reputation as a lawyer and therefore her capacity to provide for her family.

Recent statistics released by the Ministry of Justice make clear the downward trend in suppression orders being made. Table One shows the number of suppression orders made in 2011 and 2015.²⁸ Where interim orders have remained relatively static permanent suppression orders have almost halved.

Table 1	2011	2015
Interim Orders	1,232	1,191
Permanent Orders	640	317

It is not clear from the statistics whether the permanent orders have been granted for those acquitted or convicted of offending. In any event when those figures are aligned with the statistics for people appearing in court during 2015 and the outcomes of those appearances, it becomes clear that suppression orders, both permanent and interim are exceedingly rare. Table Two sets out the Ministry of Justice figures for court appearances in 2015.²⁹

Table 2	2015	Percentage of Total
Convicted	155,517	76%
Diversion/s 106	8,579	4.2%
Not Proved	39,567	19%
Other	825	.4%
TOTAL	204, 488	

As is evident therefore, the legislatures closed list of the grounds upon which name suppression may be granted means that the pool of defendant’s eligible to have their name suppressed is now significantly smaller and not only results in applications being dismissed but likely results in people not making applications for name suppression in the first place,

²⁷ *Tabb v R* [2016] NZHC 319 at [13] to [14].

²⁸ Amy Adams “Permanent name suppression figures halved” (27 April 2016),

<https://www.beehive.govt.nz/release/permanent-name-suppression-figures-halved>

²⁹ <http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7351>

due to the unlikelihood of an order being made and the resultant red flag an application may send to the media.

The 2011 Act has been heralded as tipping the scales of justice back towards openness and away from any curtailment of our freedom of expression,³⁰ but this author queries why the scales needed to be tipped back in that direction when name suppression as of right is not seemingly inconsistent with the principle of open justice and where the limitation on the freedom of expression is arguably reasonable and demonstrably justified.

III Freedom of Expression

Section 14 of the New Zealand Bill of Rights Act 1990 (“NZBORA”) provides that “everyone has the right to freedom of expression, including the right to seek, receive, and impart information and opinions of any kind in any form”. As with all rights under NZBORA, the right to freedom of expression is not absolute but is subject to section 5 of the Act which states that NZBORA rights “may be subject ... to ... reasonable limits ... as can be demonstrably justified in a free and democratic society”.

That name suppression legislation has been considered a reasonable and demonstrably justified limitation on freedom of expression is evident from the fact that such legislation exists.³¹ One of the questions for this paper is whether name suppression of the type proposed, until such time as a conviction is entered, limits freedom of expression beyond that which is demonstrably justified.

In assessing whether a limitation is reasonable and demonstrably justified the Supreme Court has provided the following guidance:³²

- (a) Does the provision serve an objective sufficiently important to justify limitation of the right or freedom?
- (b) If so:
 - (i) Is the limit rationally connected with that objective?
 - (ii) Does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - (iii) Is the limit in due proportion to the importance of the objective?

³⁰ Michael Cummings (ed) “Suppression guidelines clearer” *Manawatu Standard* (online ed, Manawatu, 23 November 2013).

³¹ In addition in *Hirt v College of Physicians and Surgeons* (British Columbia) [1985] 60 BCLR 283 at 286, McFarlane J stated: “It is demonstrably justifiable in a free and democratic society that the openness rule be restricted to protect the innocent when ... nothing will be accomplished by publicising the identities of the persons ...”.

³² *Hansen v R* [2007] NZSC 7 at [104] as cited in *B v Waitemata District Health Board* [2016] NZCA 184 at [108].

The objective of protecting an accused's reputation, his or her right to be presumed innocent, right to a fair trial and to avoid undue ostracism from society is more than sufficiently important to justify limiting the media and general public's right to receive and impart information. Blanket name suppression legislation until conviction is rationally connected with that objective and is no more than is reasonably necessary for sufficient achievement of that purpose. Specifically, the impairment on the right to freedom of expression will in most instances be temporary and is in any event only a partial restriction. The limitation will last, in most cases, only until such time as a conviction has been entered.³³ In addition the limitation will affect only the identification of the accused, the media and general public will continue to be free to be present in court and to receive and impart information on the proceedings. In this author's opinion there can be no greater objective than protecting those accused of a crime from undue ostracism and upholding their right to be presumed innocent. Therefore the proposed partial limit on the right to freedom of expression is proportionate to that objective and furthermore is a reasonable and demonstrably justified limitation.

IV Open Justice

"Open Justice" is the long revered principle that "justice should not only be done, but should manifestly and undoubtedly be seen to be done".³⁴ It is considered a cornerstone of our justice system and where any debate around name suppression exists, the principle of open justice follows shortly behind. A discussion regarding the liberation of name suppression laws is thus incomplete without a close examination of what open justice actually requires.

A The Origins of Open Justice

The principle of open justice emerged from the practice of dispute resolution over time. Specifically from the conduct of "courts" in medieval and early modern England which were attended by large numbers of people outside of the participants themselves and "where juries sat as representatives of the community which implied public access".³⁵ The principle was subsequently expanded throughout common law jurisdictions with one of the earliest judicial comments coming from the House of Lords where it famously quoted Bentham and stated:³⁶

It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. "In the darkness of secrecy, sinister

³³ At that point a defendant should have the right to apply for name suppression if they wish, for the purposes of an appeal or otherwise, and pending the outcome of that application, suppression should continue.

³⁴ *Rex v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

³⁵ Hon J J Spigelman AC, Chief Justice of New South Wales "The Principle of Open Justice: A Comparative Perspective" (Address to the Media Law Resource Centre Conference, London, 20 September 2005) at 4.

³⁶ *Scott v Scott* [1913] AC 417 at 477 as cited by Hon JJ Spigelman AC, Chief Justice of New South Wales, at 5.

interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice”. “Publicity is the very soul of justice ...”

In more modern times open justice is said to exist by virtue of Article 10 of the Universal Declaration of Human Rights which gives a person faced with a criminal charge the right to “a fair and public hearing” and section 25(a) of NZBORA which legislates the same right to the accused. Similarly, Article 14(1) of the International Covenant on Civil and Political Rights,³⁷ states:³⁸

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 ... [emphasis added].

The starting point then is the defendant’s right to a public hearing with Articles 10, 14(1) and section 25(a) doing no more than granting such a right to the individual accused. It has been argued, with reference to Article 14(1) that “this wording could suggest that if the parties wanted to give up this right the public and media would have no right of access”.³⁹ On the plain wording of the Article this is undoubtedly true. In New Zealand however, Article 14 has been adopted as requiring that “all regular Courts of Justice must conduct their proceedings ... in a public court with open doors”.⁴⁰ Section 196 of the 2011 Act has taken this one step further and legislated that “every hearing is open to the public”.⁴¹ In this respect it has been noted that in New Zealand “the right to a public court system lies with the public rather than the parties to the hearing” which places New Zealand a step ahead of the position envisaged by Article 14.⁴²

Whereas it could be argued therefore that open justice requires no more than judicial proceedings being conducted in open court and the subsequent judgment being made public, what we now have is the principle being utilised to justify the widespread publication of the

³⁷ New Zealand ratified the International Covenant on Civil and Political Rights on 28 December 1978.

³⁸ Article 14(1) goes on to state: The press and the public may be excluded from all or part of a trial for reasons of morals, public order ... or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

³⁹ Claire Baylis “Justice done and justice seen to be done – the public administration of justice” (1991) 21 VUWLR 177 at 182.

⁴⁰ Addendum to the 1980 Initial Report of New Zealand on the International Convention of Civil and Political Rights [1982] Human Rights Committee 15th Session CCPR /C/ 10/ Add 6, 51 as cited in Claire Baylis “Justice done and justice seen to be done – the public administration of justice” (1991) 21 VUWLR 177 at 182.

⁴¹ Criminal Procedure Act 2011, s 196. A similar provision existed under the 1985 Act by way of s 138.

⁴² Claire Baylis, above n 39 at 183.

accused's identity whether their charges result in conviction or not. It is when open justice as a principle is used in this way that requires closer examination.

*B Open Justice in Practice and the Media*⁴³

In *M v Police* Fisher J provided the following rationale for open justice: "In general the healthy winds of publicity should blow through the workings of the Courts. The public should know what is going on in their public institutions".⁴⁴ As it is a very rare sight to see members of the public in court observing proceedings, what the public know of court proceedings comes largely from the media as "surrogates of the public".⁴⁵

The problem now with the significant role that the media plays in upholding the principle of open justice, is that it is a principle that was developed during a time where media saturation of the type we currently have was unanticipated. When open justice as a fundamental principle was formed media coverage was fleeting and to a large extent inaccessible. It was nothing like the media saturation we face today which is characterised by instantaneous reports on the internet which become permanent, able to be searched in the years and decades to come.⁴⁶ Publication of an accused's charge is no longer a transitory shame but is permanently etched into the fabric of the World Wide Web. With this fundamental change comes the requirement to reassess the principle of open justice. It was this point that was raised by Hon Lianne Dalziel during the first reading of the Criminal Procedure (Reform and Modernisation) Bill 2010 ("the Bill"):⁴⁷

That rule [open justice] was not developed in this environment, at all. That rule was about having courts open, and about people being able to freely come and go and observe the processes of justice. Nowadays people are convicted before they even have a trial: they are convicted in the court of public opinion before the case even starts ... I wonder whether this is not a good time to reflect on the history of why we have ended up with this presumption operating the other way.

The additional by product of the media being the key-holders of open justice is that what the public know about court proceedings is "determined by what individual reporters and media

⁴³ Where "media" is referred to in this paper it should be taken to be a reference to the print and online media who cover the large majority of court proceedings and from where the wider public are most likely to access information about the day to day happenings at court. This includes publications such as The Dominion Post, Stuff, The New Zealand Herald, Scoop and Newshub.

⁴⁴ *M v Police* (1991) 8 CRNZ 14 at 15. It is worth nothing that His Honour also stated that the presumption of innocence and the risk of substantial harm to an innocent person should be expressly articulated to avoid the danger that they will be overlooked.

⁴⁵ *R v Liddell*, above n 2.

⁴⁶ The permanence of media publication, particularly on the internet must be contrasted with criminal records themselves, which in New Zealand on account of the Criminal Records (Clean Slate) Act 2004 are no longer permanent but rather, subject to few exceptions, a person's criminal record can be wiped clean and therefore hidden after seven years.

⁴⁷ Hansard Debate (24 November 2010) 669NZPD at 15753, Hon Lianne Dalziel (Labour).

outlets deem newsworthy enough to cover”.⁴⁸ A valid concern with this, as well as the instantaneous and permanence of publication, is the often inaccurate and/or unfair reporting of events that occur in court. For example, in a case where a careless driving causing injury charge had been dismissed against a taxi driver, the key issue was whether that defendant had driven through a red light. The Presiding Judge found that the evidence had not established that fact, however in an article published online and dated 13 January 2014 the defendant’s name was recorded as an example of drivers running red lights or “pushing the orange light”.⁴⁹

This has led to widespread mistrust of the media, particularly from the legal fraternity. The New Zealand Law Society in its submission to the Law Commission in 2009 highlighted the fact that “we cannot rely on the media to report in a balanced way”.⁵⁰ Similarly the Criminal Bar Association in submissions made with regard to the Bill questioned the media’s “clamour” for greater publication rights and suggested the reason may be “based on commercial interests rather than those of the interests of justice”.⁵¹

This raises an important question; what drives the media? Are they driven by the need to fairly and accurately represent court proceedings in order to uphold the principle of open justice and to discharge their duty to be the public’s “eyes and ears” or are they driven by the need to make a profit, to up their readership and satisfy their ad buyers? Without seeming cynical this author believes it is the latter which drives the media and to that end agrees with the argument that:⁵²

... to suggest that the media represents the public in court is naïve at best: the media, if it is in court, is there with its own interests in mind. When the media opposes an application for a name suppression order, it may be that the motivation for this is more likely to be related to its own vested commercial interests rather than reflect a desire to serve the public interest.

It is accepted that in New Zealand the print media are regulated by the New Zealand Press Council (“the Press Council”) and that one of the principles to which the media must adhere is that:

⁴⁸ Colleen Davis “The Injustice of Open Justice” (2001) 8 JCULR 92 at 97.

⁴⁹ Olivia Wannan “Police see red at drivers ‘pushing the orange light’” *The Dominion Post* (online ed, Wellington, 13 January 2014).

⁵⁰ New Zealand Law Society, www.lawsociety.org.nz/practice-resources/commentary/law-reform-background/name-suppression-and-publication

⁵¹ Criminal Bar Association of New Zealand Incorporated “The Criminal Procedure (Reform and Modernisation) Bill, Submissions of the Criminal Bar Association of New Zealand Incorporated to the Justice and Electoral Select Committee” (18 February 2011) at 2.

⁵² Colleen Davis, above n 48 at 99.

Publications should be bound at all times by accuracy, fairness and balance, and should not deliberately mislead or misinform readers by commission or omission. In articles of controversy or disagreement, a fair voice must be given to the opposition view.

However there are significant limitations to the powers that the Press Council has. For example, the Press Council has a reactive jurisdiction where it is not a “watchdog” per se but rather responds to complaints made by individuals about published articles. In addition, its powers to penalise lack any real consequence. The strongest penalty that it can impose is to require that the publication publish the “essence” of the Press Council’s ruling. Such a penalty does little to alleviate the harmful publicity that may have already been suffered by an accused.

An alternative to liberalising the name suppression laws may be strengthening the powers of the Press Council to hold the print media to account. However, to empower the Press Council in any meaningful way would require that it be given “watchdog” powers where it is continually reviewing material published in print and online to ensure that the facts are set out in a fair and balanced way. The costs associated with such a step would be significant and given the digital age which the Press Council must now grapple with, such a procedure is unrealistic and would remain akin to placing the ambulance at the bottom of the cliff. The better option is to proactively limit the material which can be published by media outlets by way of liberal name suppression laws. Therefore even if an article is unfair and/or unbalanced, the subject of the article is afforded some protection.

C Not Mutually Exclusive with Name Suppression

As with all rights and principles, the principle of open justice is not absolute. In *Police v O’Connor*, Thomas J confirmed that:⁵³

The principles that justice must be administered openly and publicly is not absolute. If that were so, true justice would at all times be defeated ... the principle of open justice must be balanced against the objective of doing justice.

In the case of name suppression this must be the case despite the fact that open justice more often than not is used as the rationale against name suppression in a way which suggests the two are mutually exclusive concepts. But this cannot be true as at its core what open justice requires is that the public be made aware of what is happening in the courts, this can be achieved without the punitive aspect of naming and shaming the characters that appear. There is a difference between holding a hearing in private and holding a hearing in public yet prohibiting those who attend from publishing the name or identifying details of the accused.

⁵³ *Police v O’Connor* [1992] 1 NZLR 87, at 95-96.

It is often argued that publicity of court proceedings, particularly sentencings, hold an educative value and have a deterrent effect. This is undoubtedly correct however, where the media can still report on the substance of the case, there is no dilution of the educative or deterrent value in publication of court proceedings simply by virtue of withholding the identity of the accused until conviction; at which point the sentencing may be covered in full.

This fact has been appropriately recognised by the judiciary. In *Hirst v College of Physicians and Surgeons* Mcfarlane J most aptly stated:⁵⁴

It is demonstrably justifiable in a free and democratic society that the openness rule be restricted to protect the innocent when ... nothing will be accomplished by publicising the identities of the persons ... In this case, public access to all the facts, except for the names, will be assured. The right of the public to assess the situation, and to be satisfied that justice has been done in a fair and public hearing by an independent and impartial tribunal, will be secure; and the sense that justice has been truly done will be sharpened by the knowledge that, at the same time, the innocent have been protected.

In the more recent case of *NN v The Queen*, Venning J granted a permanent suppression order post acquittal on indecent assault charges and in doing so took into account the fact that:⁵⁵

... the principle of open justice has been observed in this case to the extent that the media have been present throughout and, subject to the suppression concerning the complainants and defendant identities, have been able to accurately report the case in detail as it has progressed ...

If a defendant's name is suppressed this does not, save for some exceptions, mean the public cannot be present in court to observe justice being done. It doesn't mean that media outlets cannot report on the proceedings.⁵⁶ It simply means the defendant's name or their identifying particulars cannot be published. To assume that name suppression invalidates open justice is to exaggerate the effect of the former. As noted by Ms Webb:⁵⁷

...it does not seem to me that the automatic ban would in any way undermine the general principle, or given ground for suspicions that justice was not being done, so long as the prohibition on publication extended only to the defendant's name and to any identifying particulars.

⁵⁴ *Hirst v College of Physicians and Surgeons* above n 31.

⁵⁵ *NN v R* [2016] NZHC 669 at [14].

⁵⁶ This was a point acknowledged by the New Zealand Law Society who in its submissions on the Law Commission Issues Paper on Name Suppression stated that prohibition of publication, particularly of names, was not necessarily inconsistent with open justice. In most cases, the Court remains open, anyone can observe the proceedings, and the media is still able to report on the substance of the proceedings. See: www.lawsociety.org.nz/practice-resources/commentary/law-reform-background/name-suppression-and-publication

⁵⁷ Criminal Law Reform Committee, above n 1 at 3 to 4.

Perhaps the strongest argument for limiting name suppression laws is that publication of the name of an accused may bring forward witnesses or other complainants. It is unclear how often this happens in practice but if it were found to be a significant occurrence then a middle ground may be that reached under section 45B of the 1954 Act which allowed the court to permit publication on its own motion or on application by a party felt to be prejudiced in some way by the non-publication, by taking into account “the possibility of further evidence being offered”.

V *The Presumption of Innocence*

The presumption of innocence is both a procedural right but also a fundamental human right as enshrined in NZBORA.⁵⁸ Unfortunately, where a defendant’s name is published the presumption of innocence becomes diluted in the court of public opinion where the idea that a person wouldn’t be charged unless they had committed the offence, permeates the public debate.

In considering whether the presumption of innocence should carry weight in decisions relating to name suppression the Law Commission has put forward two vastly different views. In a 2004 report the Law Commission, following the decision in *Proctor v R*,⁵⁹ considered that insufficient recognition was being given to the presumption of innocence. The Law Commission adopted the earlier Criminal Law Reform Committee recommendation in order to address this issue, namely that after a person is charged there should be a general presumption “that publication of their name or identifying particulars” is prohibited until the substance of the case is gone into. However, in 2009 the Law Commission reversed this position and stated:

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

The Law Commission’s stance is even more curious when fair trial right considerations are at play, although it is acknowledged that fair trial rights may be considered part of what the Commission refers to as “legal protections”. Whilst the word restriction in this paper prohibits a discussion of name suppression in association with fair trial rights, which is an

⁵⁸ New Zealand Bill of Rights Act 1990, s 25(c).

⁵⁹ *Proctor v R* [1997] 1 NZLR 295 at 7, where the Court stated that where name suppression issues arise pre-trial “the presumption of innocence is to be taken into account and given such weight as is appropriate having regard to the facts of the case”.

important factor in its own right, in light of the Commission's opinion that the presumption of innocence is irrelevant to name suppression decisions, the comments in *R v B* are worth notation.⁶⁰

Once ... it has been determined that there is a significant risk that the accused will not receive a fair trial, the issue ceases to be one of balancing. The principles of freedom of expression and open justice must then be departed from, not balanced against. There is no room in a civilized society to conclude that, 'on balance', an accused should be compelled to face an unfair trial.

This author respectfully disagrees with the Commission's reversal of opinion but rather prefers the continental approach where it has been said there is a "changing meaning to the principle of [the] presumption of innocence, which is no longer regarded as a simple 'procedural' safeguard internal to criminal proceedings, but also as a 'substantial' right to be asserted vis-à-vis private parties" such as between defendants and the media.⁶¹ Likewise in Australia it has been held that the presumption of innocence "must be a basic consideration in the decision on every application for a name suppression order".⁶²

VII *Lessons from Germany*

It has been argued that the continental approach to name suppression is primarily involved with the need to safeguard the privacy, personal dignity and presumption of innocence of trial participants against interference by the media.⁶³ In Germany the supreme value enshrined in its Constitution is said to be "human dignity".⁶⁴ This focus is cemented in Articles 1(1) and 2(1)⁶⁵ of the Basic Law of Germany (Grundgesetz) which gives individuals a 'general right to personality', a right which has been accepted by the Federal Courts of Justice as a basic right since 1954 and which "protects an individual's personality and privacy even against statements that are true and non-defamatory but in some other way affect the privacy of the individual".⁶⁶

This right has been variously litigated and in a famous 1973 case from the German Federal Constitutional Court, an injunction was granted to a man convicted of accessory to armed

⁶⁰ *R v B*, above n 21 at [2].

⁶¹ Giorgio Resta "Trying Cases in the Media: A Comparative Overview" 71-FALL Law 7 Contemp. Probs. 31 at 41.

⁶² Colleen Davis, above n 48 at 98.

⁶³ Giorgio Resta, above n 61 at 40.

⁶⁴ BVerfG, Decision of 05 June 1973 – 1 BvR 536/72 (Lebach 1), BVerfGE 35, 202.

⁶⁵ Article 1(1) states: Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority". In conjunction Article 2(1)states: "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law".

⁶⁶ Lawrence Siry and Sandra Schmitz "A Right to be Forgotten? – How Recent Developments in Germany May Affect the Internet Publishers in the US" European Journal for Law and Technology, Vol 3, No 1 (2012) at 3 and at footnote 17.

robbery and murder to stop the airing of a documentary based on the petitioner's crime in so far as it mentioned the petitioner by name and reproduced a likeness of him. In reversing the lower courts refusal to grant the injunction the court provided the following commentary on the competing rights of personality and the media's right to inform:

However, the interest to receive information does not prevail absolutely. The importance of the right to personality, which is a corner-stone of the Constitution, requires not only that account must be taken of the sacrosanct, innermost personal sphere ... but also a strict regard for the principle of proportionality. The invasion of the personal sphere is limited to the need to satisfy adequately the interest to receive information, and the disadvantages suffered by the culprit must be proportional to the seriousness of the offence or to its importance otherwise for the public. Consequently, it is not always admissible to provide the name, picture, or any other means of identifying the perpetrator.

Where criminal court reporting is concerned the German Penal Code criminalises the disclosure of information on court hearings until it has been concluded:⁶⁷

Unlawful disclosure of facts subjudice⁶⁸

Whosoever

...

3. publicly communicates verbatim essential parts or all of the indictment or other official documents of a criminal proceeding, a proceeding to impose a summary fine or a disciplinary proceeding before they have been addressed in public hearing or before the proceeding has been concluded

shall be liable to imprisonment not exceeding one year or to a fine

It is acknowledged that this section, whilst applying to the media, only prohibits "verbatim" publication however in conjunction with the 'general right to personality', common law developments in Germany confirm the presumption against publication of an accused's name and photograph on the basis that "the publication of a suspect's identity is not per se a matter of public interest".⁶⁹ This start point is strengthened by the German Press Council which

⁶⁷ German Penal Code, s 353d. The Courts have given additional guidance as to when reporting on a crime committed is appropriate, see Lawrence Siry and Sandra Schmitz, above n 61 at 4 where the case law was summarized as follows: "However, balancing the legal interests involved, news coverage which identifies an offender is legitimate, where a current case is concerned that is of some severity or of specific interest to the public either because the crime is of interest or a person in a specific position has committed it ... German courts have considered the degree of interest of the public on news reporting as proportionate to the way a crime was committed and the severity of the offence. Thus severe crimes that particularly affect society, allow for detailed news reports about the offence, the way it was committed, the person of the offender and his motives as well as the prosecution of his case". At footnote 32 it is confirmed that the situation is different where minor offences are concerned where the principle of proportionality would "generally not allow for news reports identifying the offender".

⁶⁸ Meaning "under judicial consideration and therefore prohibited from public disclosure".

⁶⁹ Giorgio Resta, above n 61 at 55.

grants extensive protection to an accused's anonymity and provides that journalists "shall not usually publish any information in words or pictures that would enable identification of victims and perpetrators".⁷⁰

Whilst there is much to be learned from Germany's approach to name suppression in terms of the heightened premium placed on human dignity and personality, it is unlikely that New Zealand will follow this course given it would require a focus on privacy rights that does not currently exist in New Zealand outside of the slowly developing tort.⁷¹

VII Conclusion

There is no doubt that New Zealand is to be commended for its attempt to strike a balance between the competing interests that surround the question of name suppression. One need only look to the United States to assure themselves that New Zealand has at least attempted to protect a defendant during the criminal justice process.

In today's world however publication is rapid, what may once have taken weeks or months to spread across New Zealand now takes only minutes. In addition there can no longer be reliance placed on the publicity being transitory as the very nature of the internet is the permanence of the material posted.⁷² The Press Council while holding the print media to account is limited by its reactive rather than proactive jurisdiction and unhelpful penalty provisions. These facts require that the legislators reconsider the current name suppression laws.

Whilst the adoption of the continental approach is unlikely without greater privacy protections, there remains hope, in light of the brief ten month period between September 1975 and July 1976 that future Governments will acknowledge the need for more liberalised name suppression laws that will not interfere with the principle of open justice nor will they unreasonably limit the right to freedom of expression.

⁷⁰ Giorgio Resta, above n 61 at 56.

⁷¹ In *Gravatt v The Coroners Court at Auckland* [2013] NZHC 390 at [72], the Court in considering an appeal against the Coroners suppression of the names of health professionals involved in the care of a child who had passed away stated: "...personal privacy in this context refers to personal facts in respect of which there is a reasonable expectation of privacy. A general claim to privacy will not be sufficient; but the more intimate the facts, the more compelling the case will be for limits to be placed on freedom of speech and open justice principles. Balanced against this, a genuine public interest or concern in those facts may outweigh even a strong privacy interest".

⁷² *R v B*, above n 21 at [78].

VIII BIBLIOGRAPHY

A Legislation

1 New Zealand

Criminal Justice Act 1954

Criminal Justice Amendment Act 1975

Criminal Justice Amendment Act 1976

Criminal Justice Act 1985

New Zealand Bill of Rights Act 1990

Criminal (Reform and Modernisation) Bill 2010 (243-2)

Criminal Procedure Act 2011

2 International

Universal Declaration of Human Rights 1948.

International Covenant of Civil and Political Rights 1976.

The German Penal Code (Strafgesetzbuch)

The Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland)

B Parliamentary and Government Materials

New Zealand Law Commission Report 85, Hon Justice Bruce Robertson, President, “Delivering Justice for All, A Vision for New Zealand Courts and Tribunals” (March 2004).

New Zealand Law Commission Issues Paper 13, Rt Hon Sir Geoffrey Palmer, President “Suppressing Names and Evidence” (December 2008).

New Zealand Law Commission Report 109, Rt hon Sir Geoffrey Palmer, President, “Suppressing Names and Evidence” (October 2009).

Hansard Debate (24 November 2010) 669 NZPD.

Criminal Bar Association of New Zealand Incorporated “The Criminal Procedure (Reform and Modernisation) Bill, Submissions of the Criminal Bar Association of New Zealand Incorporated to the Justice and Electoral Select Committee” (18 February 2011).

Hansard Debate (27 September 2011) 676 NZPD.

Hansard Debate (29 September 2011) 676 NZPD.

Report of the Criminal Law Reform Committee, Mr R C Savage QC, Chairman “The Suppression of Publication of Name of Accused” (September 1972).

C Case Law

1 New Zealand

B v Waitemata District Health Board [2016] NZCA 184.

DP v R [2015] NZCA 476.

GAP v New Zealand Police HC ROT CRI 2006-463-68, 23 August 2006.

Gravatt v The Coroners Court at Auckland [2013] NZHC 390

Hansen v R [2007] NZSC 7.

Lewis v Wilson & Horton Ltd [2000] 3 NZLR 546.

M v Police (1991) 8 CRNZ 8.

NN v R [2016] NZHC 669.

Police v O'Connor [1997] 1 NZLR 87.

Proctor v R [1997] 1 NZLR 295.

R v B [2008] NZCA 130.

R v Liddell [1995] 12 CRNZ 458.

Re Victim X [2003] 3 NZLR 220.

Rogers v TVNZ [2007] NZSC 91.

Robertson v Police [2015] NZCA 7.

Stewart v Police [2013] NZHC 1280.

Tabb v R [2016] NZHC 319.

X v New Zealand Police HC Auckland CRI 2006-404-259, 10 August 2006.

2 *International*

Bundesverfassungsgericht (First Division) 5 June 1973 BVerfGE 35, 202 (Translated by Professors P. Schlechtriem, B. Markesinis and S. Lorenz).

Hirt v College of Physicians and Surgeons (British Columbia) [1985] 60 BCLR 283.

Rex v Sussex Justices; Ex parte McCarthy [1924] 1 KB 256.

Scott v Scott [1913] AC 417.

D *Journal Articles*

Claire Baylis “Justice done and justice seen to be done – the public administration of justice” (1991) 21 VUWLR 177.

Colleen Davis “The Injustice of Open Justice” (2001) 8 JCULR 92.

Candice Lazar “New Zealand’s Litigation-Related Name Suppression Policies: A Workable Model for The United States” (2012) 20 U. Miami Int’l & Comp. L. Rev. 59.

Giorgio Resta “Trying Cases in the Media: A Comparative Overview” 71-FALL Law 7 Contemp. Probs. 31.

Lawrence Siry and Sandra Schmitz “A Right to be Forgotten? – How Recent Developments in Germany May Affect the Internet Publishers in the US” *European Journal for Law and Technology*, Vol 3, No 1 (2012).

Michael Stace “Name Suppression and the Criminal Justice Amendment Act 1975” *Brit. J. Criminal.* Vol 16 No. 4 (October 1976).

E Media Articles

Michael Cummings (ed) “Suppression guidelines clearer” *Manawatu Standard* (online ed, Manawatu, 23 November 2013).

Simon Hendery “Privacy versus the public’s right to know” *The New Zealand Herald* (online ed, Auckland, 30 June 2000).

Olivia Wannan “Police see red at drivers ‘pushing the orange light’” *The Dominion Post* (online ed, Wellington, 13 January 2014.)

F Speeches

Hon J J Spigelman AC, Chief Justice of New South Wales “The Principle of Open Justice: A Comparative Perspective” (Address to the Media Law Resource Centre Conference, London, 20 September 2005).

G Websites

www.lawsociety.org.nz/practice-resources/commentary/law-reform-background/name-suppression-and-publication

www.justice.govt.nz/justice-sector/statistics/documents/trends-in-conviction-and-sentencing-december-2015

<https://www.beehive.govt.nz/release/permanent-name-suppression-figures-halved>

<http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7351>

<https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-844/that-was-the-law>