

**E261 Edwards, A.
2009**

Name suppression under Section 140 of the Criminal Justice Act 1985: Is the price of justice eternal publicity?

ADAM EDWARDS

**NAME SUPPRESSION UNDER SECTION 140
OF THE CRIMINAL JUSTICE ACT 1985:
IS THE PRICE OF JUSTICE
ETERNAL PUBLICITY?**

**LLM RESEARCH PAPER
SUBMITTED FOR THE LLB (HONS) DEGREE**

**LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON**

2009

Victoria

UNIVERSITY OF WELLINGTON

*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



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ABSTRACT

This abstract is a summary of the main points of the article. It is intended to provide a brief overview of the content for those who are unable to read the full text. The abstract should be written in a clear and concise manner, using simple language and avoiding technical terms where possible. It should also include the author's name and the title of the article.

Section 140 of the Criminal Code Act gives the court with a broad discretion to power to suppress the names of any person named in a report or of any other person named in the proceedings. It is a difficult task to write a report which has not been written in a public interest of transparency and integrity in the criminal justice system of the country.

The aim of this paper is to discuss the legal aspects surrounding the application of section 140 and suggest the direction necessary for reform. First, the application of the section is examined in detail. It is argued that the current approach fails to properly acknowledge the interests of the members of both the prosecution and defence at the stage of the proceedings in which the report is made. These deficiencies and the lack of legislative guidance are said to be undesirable. Secondly, the application of the section to third parties and other persons is addressed. It is concluded that a court should not automatically restrict the ability of the court to offer relevant evidence in this regard directed to proceedings only by virtue of a reference to a party to the proceedings. It is also argued that the current approach to the application of the section is inconsistent with the principle of the publicity of the justice system. It is argued that the report is necessary to have done so provide a transparent account. It is suggested that a new provision is necessary to have required the court to make and clearly specify the reasons for its decision.

This paper takes the position that the current approach to section 140 is not in line with the principle of the publicity of the justice system. It suggests that while it is not necessary to have a public account of the proceedings, it is necessary to have a public account of the reasons for the court's decision. It is suggested that a new provision is necessary to have required the court to make and clearly specify the reasons for its decision.

STATEMENT ON WORD LENGTH

The aim of this paper is to discuss the legal aspects surrounding the application of section 140 and suggest the direction necessary for reform. First, the application of the section is examined in detail. It is argued that the current approach fails to properly acknowledge the interests of the members of both the prosecution and defence at the stage of the proceedings in which the report is made. These deficiencies and the lack of legislative guidance are said to be undesirable. Secondly, the application of the section to third parties and other persons is addressed. It is concluded that a court should not automatically restrict the ability of the court to offer relevant evidence in this regard directed to proceedings only by virtue of a reference to a party to the proceedings. It is also argued that the current approach to the application of the section is inconsistent with the principle of the publicity of the justice system. It is argued that the report is necessary to have done so provide a transparent account. It is suggested that a new provision is necessary to have required the court to make and clearly specify the reasons for its decision.

Arnold Bennett (1867 – 1931): The price of justice is eternal publicity

To my parents

ABSTRACT

Name suppression is said to be disrupting the winds of open justice. While name suppression orders prohibit publication of identifying details of those involved in legal proceedings, open justice demands that justice must be manifestly seen to be done. Consequently name suppression is never far from controversy – frustration about this area of law frequently pervades all media.

Section 140 of the Criminal Justice Act 1985 provides the court with a broad discretionary power to suppress the name of any person accused or convicted of an offence, or of any other person connected with the proceedings. It is a difficult balance to strike. While a number of principles have emerged, there is a notable amount of inconsistency and divergence in the approach to the exercise of the discretion.

The aim of this paper is to address three issues surrounding the application of section 140 and suggest the direction necessary for reform. Firstly, the application of the section to defendants is considered. It is argued that the current approach fails to properly acknowledge the relevance to the assessment of both the presumption of innocence and the stage of the proceedings at which the application is made. These deficiencies and the lack of legislative guidance are said to be undesirable. Secondly, the application of the section to third parties and victims and witnesses is addressed. It is contended that a recent decision has unfavourably restricted the ability of the court to offer adequate protection to third parties connected to proceedings only by virtue of a relationship to a party to the proceedings. It is also argued that the current approach to the application of the section to victims and witnesses is inappropriate. Finally, the suitability of the present penalty regime is evaluated. It is argued this regime is inadequate and does not provide a meaningful deterrent. It is suggested that a new provision is necessary to better recognise the interests at stake and clearly specify the consequences of disobedience.

This paper takes the position that name suppression does not herald the end of open justice. It suggests that while in some instances name suppression is justified, more legislative guidance is needed to assist the courts to strike the appropriate balance as to when it will be justified.

STATEMENT ON WORD LENGTH

The text of this paper (*excluding* abstract, table of contents, footnotes, author-suggested provisions, bibliography, and appendices) comprises approximately 16,900 words. The provisions created by the author which form part of the appendix to this paper have also been included in the main text for the convenience of the reader. This approach has been approved by the supervisor of this paper.

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I INTRODUCTION

[T]he healthy winds of publicity should blow through the workings of the Courts... It is important that justice is seen to be done.¹

Name suppression is never far from controversy. Allegations of inconsistency, favouritism towards select groups of society, and general frustration about the lack of transparency in this area of law are often said to illustrate that name suppression is disrupting the winds of open justice.²

The principle of open justice has long been regarded as an essential element of our judicial system.³ However this principle is not absolute. The primary object of the judiciary is to ensure that justice is done and sometimes open justice must yield to other considerations.⁴ Name suppression orders prohibit publication of identifying details of those involved in legal proceedings. This restriction sits uncomfortably with open justice.

Name suppression issues have been considered numerous times by different organisations.⁵ The Ministry of Justice and Law Commission are currently undertaking a project addressing Criminal Procedure in New Zealand.⁶ As part of this project, an Issues Paper investigating the Suppression of Names and Evidence in Judicial Proceedings was

¹ *M v Police* (1991) 8 CRNZ 14, 15 Fisher J.

² See, for example, Lawyer says All Black's name will have to go from website www.nzherald.co.nz (last accessed 27 May 2009); Sensible Sentencing Trust "Family Frustration" (30 April 2008) Press Release; and New Zealand Herald *Submission on Law Commission Paper dealing with Suppression* (submission to the New Zealand Law Commission, 2009) where numerous examples from Editorials that have featured in its paper over the years are presented. See also, Simon Mount "The Interface between the Media and the Law" (2006) NZLRev 413, 438-439; and Australian Press Council www.presscouncil.org.au (last accessed 22 September 2009) which illustrates that this debate is common in other jurisdictions.

³ New Zealand Law Commission *Suppressing Names and Evidence* (NZLC IP13, Wellington, 2008) 3. ["*Suppressing Names and Evidence*"].

⁴ *Scott v Scott* [1913] AC 417, 437 (HL) Viscount Haldane. The main justifications for limiting the openness of a court include: protection of the vulnerable; the administration of justice; commercial secrecy; and overriding privacy interests. See New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 300. ["*Delivering Justice for All*"].

⁵ See, for example, *Delivering Justice for All*, above n 4, and Criminal Law Reform Committee *The Suppression of Publication of Name of the Accused* (Report 5, Government Printer, Wellington, 1972).

⁶ *Suppressing Names and Evidence*, above n 3, 5.

produced in December 2008.⁷ This paper called for submissions from the public and a final report is expected to be presented to Parliament later this year.⁸ The frequency of this discussion, coupled with continued public and media frustration, suggest that name suppression is an issue that will not easily be blown away. There are a number of difficult matters that require clarification and reform. The public and media demand more transparency.

The exclusive focus of this paper is the application of section 140 of the Criminal Justice Act 1985 (“CJA”). Suppression orders made under this section are the most commonly encountered in criminal proceedings. The aim of this paper is to directly address three principal issues surrounding name suppression in section 140.

After defining the rights at issue and the current legal framework the three issues are addressed in turn. Firstly, the predominant approach to name suppression for accused, convicted and acquitted defendants is examined. It is suggested that the broad and unfettered discretion in section 140 has resulted in a notable amount of inconsistency and divergence in approach and that legislative direction is necessary to clarify outstanding issues and assist the court in the exercise of its discretion. Secondly, the application of section 140 to persons, other than defendants, who are “connected with proceedings” is analysed. It is suggested that a recent case may have unfavourably limited the application of section 140 to third parties and that there are sound policy reasons to justify that the ability to make such an order should remain. Particular attention is also paid to victims and witnesses where it is suggested that the current approach to name suppression for these individuals is unsuitable. Finally, the penalty regime for breach of suppression orders is evaluated. It is suggested that the regime is inadequate and does not provide a meaningful deterrent. After each of the three issues is addressed, a new provision is suggested by the author.

⁷ *Suppressing Names and Evidence*, above n 3.

⁸ New Zealand Law Commission www.lawcom.govt.nz (last accessed 19 September 2009). The report was originally expected to be published in July 2009, but is to now be published in October 2009.

II RIGHTS AT ISSUE

Name suppression is an area of law that draws together a diverse range of conflicting constitutional rights. Moreover these private and public rights must be balanced amid the complex personal circumstances surrounding every name suppression application.

A Open Justice⁹

The principle of open justice provides that “[justice] must manifestly be seen to be done”.¹⁰ Courts must conduct their business publicly – a position further emphasised in criminal proceedings where individual liberty is at stake.¹¹ The principle has two aspects:¹²

[A]s respects *proceedings in the court itself* it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the *publication to a wider public of fair and accurate reports* of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.

Open justice is an important safeguard against judicial bias and unfairness, ensuring judicial accountability:¹³ “a judge while judging is himself on trial”.¹⁴ It ensures that the public can observe the proper administration of justice, accentuating

⁹ See also Eric Barendt *Freedom of Speech* (2 ed, Oxford University Press, New York, 2005) 338-342 for further elucidation of the principle.

¹⁰ John Burrows and Ursula Cheer *Media Law in New Zealand* (5 ed, Oxford University Press, Melbourne, 2005) 325.

¹¹ Claire Baylis “Justice Done and Justice Seen to be Done – the Public Administration of Justice” (1991) 21 VUWLR 177, 192.

¹² *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 449-450 (HL) Lord Diplock (emphasis added).

¹³ *Ibid.*

¹⁴ *R v Wharewaka & Ors* (8 April 2005) HC AK CRI 2004-092-4373, para 13 (HC) Baragwanath J.

accountability in the judicial system. However the principle is not absolute and must sometimes yield to other concerns, such as the right to a fair trial.¹⁵

While open justice is a well-established common law principle, the right to a fair and public trial is affirmed in the International Covenant on Civil and Political Rights,¹⁶ the New Zealand Bill of Rights Act 1990 ("BORA") and the CJA itself.¹⁷

The other aspect of open justice encapsulates the notion that fair and accurate publication of court proceedings should not be suppressed.¹⁸ This complements the rights of freedom of expression and freedom of the press.

B Freedom of Expression and Freedom of the Press

While both are related, the principle of open justice is more directed towards transparency and accountability in the judicial process, whereas the rights of freedom of expression and freedom of the press are focussed on the ability of the public and media to hear and to report what is happening within the community – particularly where public institutions like the judiciary are concerned.¹⁹

Section 14 of the BORA provides that "everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."²⁰ This right is also not absolute and subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic

¹⁵ *Scott v Scott*, above n 4, 437 Viscount Haldane. See also, Eric Barendt, above n 9, 339: "...it would make no sense to invoke it [the principle of open justice] when publicity would be inimical to the ends of justice it is supposed to promote".

¹⁶ International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 14(1).

¹⁷ Bill of Rights Act 1990, s 25(a); and Criminal Justice Act 1985, s 138(1).

¹⁸ *Attorney-General v Leveller Magazine Ltd*, above n 12, 450 Lord Diplock.

¹⁹ *X v New Zealand Police* (10 August 2006) HC AK CRI-2006-404-259, para 22 (HC) Baragwanath J. The author notes that interestingly one academic has questioned whether the freedom of expression can be directly applied to name suppression: Media Law Journal www.medialawjournal (last accessed 23 September 2009); and another suggests that categorising the media as having a *right* to report proceedings may be inappropriate: Eric Barendt, above n 9, 341.

²⁰ The Freedom of Expression is also affirmed in the Universal Declaration of Human Rights (UDR) and the International Covenant on Civil and Political Rights.

society.”²¹ While the Court of Appeal has recognised that it is necessary to consider whether an order prohibiting publication of a name is a reasonable limitation on the right to freedom of expression,²² often it is not considered explicitly as a distinct right separate from the principle of open justice.²³

In conjunction with open justice, freedom of expression confirms the freedom of the press to report on judicial proceedings. The media are seen as important players in the administration of justice, with a “right to report [on judicial proceedings] fairly and accurately as ‘surrogates of the public’.”²⁴

C Right to a Fair Trial

The right to a fair trial is affirmed in section 25(a) of the BORA. This right must be considered when publicity of a name may prejudice the ability of the court to conduct a fair and impartial trial. When there is a significant risk that an individual will not receive a fair trial, this right is deemed paramount as it is considered to be a fundamental right and central to a free and democratic society:²⁵ “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”.²⁶

D Presumption of Innocence

The presumption of innocence is affirmed by section 25(c) of the BORA. A relevant consideration in granting name suppression for an accused, as opposed to

²¹ Bill of Rights Act 1990, s 5.

²² *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, para 43 (CA) Elias CJ for the Court.

²³ Jessica Meech *Name Them and Shame Them? A Critique of Name Suppression Law in New Zealand* (LLB (Hons) Research Paper, Victoria University of Wellington, 2005) 52.

²⁴ *R v Liddell* [1995] 1 NZLR 538, 546 (CA) Cooke P for the Court. See also, Eric Barendt, above n 9, 313: “[T]he press should be entitled to report the proceedings for the benefit of the public who cannot, for one reason or other, attend them.”

²⁵ Jessica Meech, above n 23, 11.

²⁶ *R v Burns (Travis)* [2002] 1 NZLR 387, 404-405 (CA) Thomas J.

convicted person, is their entitlement to be presumed innocent.²⁷ When a court considers the potential adverse consequences of name publicity, it does so with an appreciation that it may be penalising a potentially innocent person.²⁸

However while the presumption has been recognised as an important consideration – and one that must be expressly articulated to avoid being overlooked²⁹ – it has received inconsistent treatment from the judiciary.³⁰ Similarly, debate outside the courts seems to be equally undecided.³¹

E Privacy and Other Rights

There is some support for recognition of “an overlapping public interest...[in] human dignity, which has emerged as a fundamental human right and is increasingly protected by the evolving right of privacy”.³² These factors are said to overlap with the presumption of innocence and be a “major interest to be weighed in favour of suppression”.³³ While the author notes that privacy is an emerging tort in New Zealand³⁴ and may become an important consideration in name suppression, there may be a number of difficulties in applying this tort.³⁵

²⁷ Katrina Jones *The Suppression Discretion: Name Suppression Law in New Zealand* (LLB (Hons) Research Paper, Victoria University of Wellington, 1995) 17.

²⁸ *M v Police*, above n 1, 16 Fisher J.

²⁹ *Ibid.*

³⁰ See, for example, *Prockter v R* (also cited as *Proctor v R*) [1997] 1 NZLR 295, 298 (CA) Thomas J for the Court. “[T]he presumption of innocence does not displace the application of the other recognised principles.” See also Jessica Meech, above n 23, 12; Katrina Jones, above n 27, 17; and *Delivering Justice for All*, above n 4, 316.

³¹ Most recently, the Law Commission has reversed its position in relation to the presumption of innocence. Compare *Delivering Justice for All*, above n 4, 316 with *Suppressing Names and Evidence*, above n 3, 29. See also Part IV D The Presumption of Innocence.

³² *R v B* [2008] NZCA 130, para 43 (CA) Baragwanath J. See also Media Law Journal www.medialawjournal.co.nz (last accessed 23 September 2009) where it is noted that the Law Commission has recognised that “privacy language” is increasingly finding its way into name suppression law.

³³ *X v New Zealand Police*, above n 19, para 12 Baragwanath J.

³⁴ *Hosking v Runting* [2005] 1 NZLR 1 (CA).

³⁵ See, for example, *Suppressing Names and Evidence*, above n 3, 24, where the application of the tort to name suppression is questioned: “How can the accused have any privacy rights in respect of the charge brought against him or her, given that the charge is essentially an allegation of a public wrong?” However, the author does suggest that the tort of privacy may have greater force in relation to name suppression for victims and witnesses. See, for example, *R v W (No 2)* (12 November 2004) HC NEL CRI-2004-042-001663, para 17 (HC) Goddard J.

III CURRENT LEGAL FRAMEWORK

A number of different statutes restrict publication of reports of proceedings and permit name suppression orders.³⁶ In addition to these specific instances, name suppression is typically divided into two familiar categories.

A Civil

The power of the court to order name suppression in civil proceedings comes from the inherent jurisdiction of the court.³⁷ Detailed principles dictating the exercise of this power have not yet been elucidated.³⁸ However, it has generally been accepted that it operates on the same principles as the more-developed jurisprudence in criminal proceedings.³⁹

B Criminal

Sections 138 to 141 of the CJA contain statutory mechanisms designed to provide exceptions to the principle of open justice.⁴⁰

1 Mandatory/Automatic suppression

There are a number of instances where suppression is mandatory – rights do not need to be balanced before an order is made.

³⁶ See, for example, Care of Children Act 2004, s 139; Children, Young Persons and Their Families Act 1989, s 438; Coroner's Act 2006, s 71; Mental Health (Compulsory Assessment and Treatment) Act 1992, s 25. Compare, Land Transport Act 1998, s 66.

³⁷ Robert Stewart "Suppression and Contempt" in *Media Law – Rapid Change, Recent Developments* (NZLS CLE Seminar 2008) 21. ["Suppression and Contempt"]. See also, Judicature Act 1908, s 16. Moreover, though strictly a creature of statute, it has been held that the District Court has the ability to make suppression orders where appropriate: See *Brown v Attorney General (Name Suppression)* [2006] NZAR 450, 452.

³⁸ Suppression and Contempt, above n 37, 21.

³⁹ *Ibid*, citing *Clark v Attorney-General (No 1)* [2005] NZAR 481.

⁴⁰ *Suppressing Names and Evidence*, above n 3, 4.

Section 139(1) of the CJA prohibits publication of the name or identifying particulars of victims of certain sexual offences. Section 139(2) prohibits publication of the name or identifying particulars of a person accused or convicted of incest or sexual conduct against a dependent family member. Both these prohibitions are subject to the court making an order for publication if the victim requests it.⁴¹

Section 139A prohibits publication of the name or identifying particulars of a witness in criminal proceedings under the age of 17.

2 *Discretionary suppression*

(a) Sections 138 and 140⁴²

Sections 138 and 140 of the CJA provide the court with discretion to restrict the reporting of court proceedings. These orders may be temporary or permanent.⁴³

Section 138(2) provides that the court may prohibit publication of identifying particulars of witnesses where the "interests of justice, or of public morality, or of the reputation of any victim of any alleged sexual offence or offence of extortion, or of the security or defence of New Zealand so require".

The focus of this paper is on section 140. This section provides a broad discretion to prohibit publication of the name and identifying particulars of any person accused or convicted of an offence, or of any other person connected with the proceedings. The provision is silent on the circumstances when name suppression should be ordered and what considerations should be taken into account. This has been left to the courts.

⁴¹ Criminal Justice Act 1985, ss (1A) and (2A).

⁴² See Part X A Appendix Criminal Justice Act 1985, ss 138, 140.

⁴³ Criminal Justice Act 1985, ss 138(4) and 140(2)-(3).

(b) The predominant approach to section 140

The precedent surrounding section 140 is often inconsistent. While it is possible to distil a number of common factors,⁴⁴ many of these considerations have been inconsistently applied in later cases. The predominant approach however, is easier to extract.

The starting point is the principle of open justice.⁴⁵ This presumption must be clearly outweighed⁴⁶ by “compelling reasons” or “very special circumstances” to justify departure from open justice.⁴⁷ Other considerations such as the triviality of the charge and impact of publicity on the particular individual may point towards a suppression order, while the possibility of discovering further offending through publishing identifying details and the public interest in knowing the true character of the person seeking suppression may point against suppression.⁴⁸ Factors such as these are only taken into account and are not determinative.⁴⁹

While this is the predominant approach to section 140 in relation to accused or convicted defendants, and victims and witnesses at any stage of a case,⁵⁰ a number of recent decisions have approached section 140 differently.⁵¹

⁴⁴ The leading Court of Appeal authorities are: *R v Liddell*, above n 24; *Lewis v Wilson & Horton Ltd*, above n 22; and *Re Victim X* [2003] 3 NZLR 220 (CA).

⁴⁵ *R v Liddell*, above n 24, 546-7 Cooke P for the Court.

⁴⁶ *Lewis v Wilson & Horton Ltd*, above n 22, para 43 Elias CJ for the Court.

⁴⁷ *Re Victim X*, above n 44, para 37 (CA) Keith J for the Court.

⁴⁸ *Suppression and Contempt*, above n 37, 16-17.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, 15.

⁵¹ See, for example, *X v New Zealand Police*, above n 19; and *Suppression and Contempt*, above n 37, 15-16. See also, Part IV E Does the Threshold Differ between the Different Stages of a Case?

C *A Door Left Ajar? The Inherent Jurisdiction of the Court*⁵²

The inherent jurisdiction of the High Court is “the exercise of an ancillary power which is not conferred by statute or by rules of court”⁵³ that exists to enable the court to act effectively as a court of justice.⁵⁴ This power is affirmed by section 16 of the Judicature Act 1908. A court may exercise this jurisdiction when it faces an issue it cannot address using its powers conferred by statute or the rules of court alone.⁵⁵

The question of whether the High Court has inherent jurisdiction outside the CJA to grant name suppression in criminal proceedings has been a little vexed. Section 138(5) of the CJA states:

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.

A number of different commentators and cases have interpreted this provision to mean that the court has no inherent jurisdiction to make the types of orders conferred by sections 138 to 141.⁵⁶ This comes from an understanding that:⁵⁷

⁵² This analysis is limited to discussion of the inherent jurisdiction of the High Court (ie, High Court, Court of Appeal and Supreme Court). The District Court (and similar judicial bodies), which may also grant suppression orders, is a court with jurisdiction conferred by statute. This court possesses only very limited inherent powers: see *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA).

⁵³ *M v Attorney-General* (1997) 15 CRNZ 148, 151 (CA) Henry J for the Court.

⁵⁴ *Taylor v Attorney-General* [1975] 2 NZLR 675, 689 (CA) Woodhouse J. For example to support its rules of practice, fulfill its judicial functions of administering justice according to law, and prevent any abuse of its processes. Confirmed on appeal to the Privy Council.

⁵⁵ *Suppressing Names and Evidence*, above n 3, 44.

⁵⁶ *Ibid*, 44-45. See, for example, *R v Appelgren* (7 February 1997) HC AK M 51/97.

⁵⁷ Claire Baylis, above n 10, 195, citing *R v X (an accused)* [1987] 2 NZLR 240, 243 (CA) Somers J. See also, Rex Woodhouse *Pre-judgment Name Suppression in Criminal Cases* (LLB (Hons) Research Paper, Victoria University of Wellington, 2007) 36; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) 325-326: “At common law, the superior Courts had inherent jurisdiction to control reporting of all proceedings. Section 138(5) of the Criminal Justice Act 1985 now provides that s 138 of that Act is substituted for the common law jurisdiction in so far as criminal proceedings are concerned.”

Sections 138 to 141 of the [Criminal Justice] Act [1985] codify the court's powers to make exceptions to the Publicity Principle in the criminal jurisdiction. The Act specifically states in section 138(5) that the provisions are in total substitution for the inherent jurisdiction which the courts previously commanded, and that the courts have no powers other than those conferred by statute to make orders suppressing evidence or witnesses names, or excluding the public from hearings:

The three sections 138, 139 and 140 of the Criminal Justice Act now contain the source and scope of the power of a Court to forbid publication of material or to exclude persons from the Court in proceedings in respect of an offence.

In the opinion of the author, this interpretation is incorrect. The powers conferred by section 138(5) "are in substitution for any such powers that a court may have had under any inherent jurisdiction" to make orders of the kind described in section 138(2) *only*.⁵⁸ Thus, while the scope of the residual jurisdiction may still be unclear,⁵⁹ the ability of the court to suppress identifying particulars using its inherent jurisdiction in situations *outside* section 138(2) still remains. Section 138(5) is qualified: it only ousts the inherent jurisdiction of the court to make suppression orders of the kind provided by section 138(2).

Moreover, this interpretation has recently been affirmed. In *Paraha and Ors v New Zealand Police*, Justice Heath rejected an argument that section 138(5) "operated to forbid a Court from making suppression orders that go beyond the scope of section 140," noting that there is "no provision in section 140 akin to section 138(5)".⁶⁰ He held that:⁶¹

All that is ousted by s 138(5) is the power of a Court to go beyond the scope of s 138(2) and (3) in hearing and determining proceedings that would otherwise be dealt with in

⁵⁸ These are orders to clear the court, and suppress evidence, submissions and the names of witnesses.

⁵⁹ It is outside the scope of this paper to consider, for example, whether in some instances the court may still have inherent jurisdiction to suppress the names of witnesses independent of section 138. Indeed interestingly, section 140 of the Criminal Justice Act 1985 provides the court with the ability to suppress identifying particulars of a witness outside the powers conferred by section 138. Moreover, section 138(9) provides that section 138 does not limit the powers of the court under section 140.

⁶⁰ *Paraha and ors v New Zealand Police* (24 April 2008) HC AK CRI 2007-092-5673, para 18 (HC) Heath J.

⁶¹ *Ibid.* paras 39-40 Heath J.

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

[...]

[I]t would be wrong to limit the powers of a District Court or the High Court to make orders which have the effect of forbidding certain types of publication in the interests of a fair trial.

While detailed consideration of the parameters and availability of the remaining inherent jurisdiction is outside the scope of this paper, the author is of the opinion that leaving the door still ajar is advantageous. Any fear of uncertainty in the ambit and parameters of the residual jurisdiction can be quelled by an understanding that it is only exercised in limited and exceptional circumstances. It must be inherently flexible to address issues that may arise which cannot be dealt with using only statutory powers or rules of the court. Complete codification to eliminate this jurisdiction in the interests of certainty removes this “measure of flexibility which may be significant when unforeseen circumstances arise”.⁶²

IV SECTION 140: DISTILLING THE PROPER APPROACH FOR DEFENDANTS

A Introduction

Section 140 of the CJA provides the court with the power in criminal proceedings to suppress the name of a defendant – whether accused, convicted or acquitted. This discretion is broad and unfettered.

The suggestion that a defendant be granted name suppression often sits as uneasily with the public as it does with the principle of open justice. However in some instances a departure from open justice is necessary, for example, to avoid the risk of an unfair trial or where publication may cause hardship to a defendant that is so severe and

⁶² *Suppressing Names and Evidence*, above n 3, 45. See, for example, *Taylor v Attorney-General*, above n 54.

disproportionate that their name ought to be suppressed.⁶³ Name suppression is a difficult area of law: important individual rights must be balanced against equally important public rights and the public interest amidst complex fact situations. The difficulty for the judiciary is to strike the appropriate balance each time.

This portion of the paper addresses a number of issues surrounding the application of section 140 to accused, convicted or acquitted defendants. The current lack of legislative guidance is first addressed, followed by analysis of the predominant approach, the place of the presumption of innocence and the significance of the often distinct considerations relevant at different stages of a case.

B The Need for More Guidance

1 Silence is unhelpful

Section 140 is silent on the circumstances when name suppression should be ordered and what considerations should be taken into account in the exercise of the discretion. The lack of guidance from the legislature is unhelpful; it is a difficult enough balance to strike.

Many principles of name suppression are now well established.⁶⁴ While some of these principles may be reiterated instinctively in each name suppression case, their familiarity does not detract from the need for more guidance, nor does it suggest that any legislative direction would just restate the obvious – a good provision would go further than simple codification of the common law position and help provide a framework for

⁶³ *Roberts v Police* (1989) 4 CRNZ 429, 431 (HC) Wylie J. See also *M v Police*, above n 1, 15 Fisher J.

⁶⁴ See, for example, *Lewis v Wilson & Horton Ltd*, above n 22, para 42 Elias CJ for the Court; *R v Liddell*, above n 24, 546-7 Cooke P for the Court; and *Suppression and Contempt*, above n 37, 16-17. For example, (generally) pointing towards suppression: whether the person is acquitted or convicted; the seriousness of the offending; possible adverse impacts upon rehabilitation prospects; the potential for significant adverse impacts upon personal, financial and professional interests. For example, pointing against suppression: the prima facie presumption is always in favour of openness; the media have a right to report proceedings fairly and accurately as surrogates of the public; and concerns such as the possibility of suspicion falling unfairly on others, the public interest in knowing the true character of the person seeking suppression, issues of public safety and the possibility of discovering further offending or victims and witnesses.

the exercise of the judicial discretion. Most importantly perhaps, the direction would resolve some difficult outstanding issues and clarify the approach to section 140. Put simply, it would help the courts to strike the appropriate balance.

Notwithstanding that many principles appear to be well established, there is a notable amount of disparity as to the proper approach to the exercise of the discretion. Moreover, those that do adopt an analogous approach often state it differently. This divergence may be a result of the broad discretion and lack of direction provided by the legislature. It is time that the approach is clarified. Indeed the Law Commission has recognised "there is considerable merit in the idea of setting out the grounds on which name suppression may be granted in legislation".⁶⁵ A level of legislative direction would assist the judiciary and help increase transparency and certainty for the public. While absolute consistency may be unattainable and a level of discretion must always be maintained that acknowledges every case is different, there is a real interest in more guidance.

2 *No need for a 'fettering code' but a real interest in more guidance*

In *R v Liddell* ("*Liddell*"), the Court of Appeal held that it would be "inappropriate for this Court to lay down any fettering code" to constrain the exercise of the discretion provided by section 140. Other decisions have reiterated this statement and recognised that any mandate for change must come from Parliament.⁶⁶

A decision to grant name suppression is an exercise of judicial discretion and can only be disturbed if "[the decision made was] based on some wrong principle or otherwise shown sufficiently clearly to be wrong."⁶⁷ As appeal rights are therefore limited, there is a real interest to ensure applications for name suppression are determined

⁶⁵ *Suppressing Names and Evidence*, above n 3, 19.

⁶⁶ See, for example, *Re Victim X*, above n 44, (HC) para 42 Hammond J: "...one would have thought that a parliamentary mandate for widespread change was required."

⁶⁷ *R v Liddell*, above n 24, 545 Cooke P for the Court. See also, *M v Police*, above n 1, 16 Fisher J: "...I should intervene only if there has been an error of principle or if the Judge has taken into account matters which should have been excluded or has failed to take into account relevant matters or if his decision is plainly wrong."

correctly first time. In most instances these applications are determined by lower courts which have faced allegations of inconsistency.⁶⁸

Whilst a degree of flexibility must remain, more legislative direction in section 140 can help increase consistency by signalling the appropriate balance to be struck between the rights of a defendant and the public interest in open justice and freedom of expression. While there is no need for a fettering code, there is a real advantage in more guidance. It must be clear that the identifying particulars of a defendant are to be suppressed only where necessary and it must be made clearer *when* this is necessary.

C Stages of a Case

1 Introduction

When a person is charged – either wrongly or rightly – with a criminal offence a continuum begins. The gamut can be broken down into three stages:⁶⁹ pre-trial (including the initial stage following arrest but before the first court appearance); at trial, but before conviction or acquittal; and post-trial, after conviction or acquittal. Name suppression can become an issue at any stage and remain a live issue.

An application for name suppression during any stage must balance the public interest and the principle of open justice against the private rights and interests of a defendant. While this balance must be struck at every stage, the considerations that are relevant at *each* stage may differ. Section 140 does not explicitly distinguish between the different stages of a case. In *Prockter v R* (“*Prockter*”), the Court of Appeal held that the principles in *Liddell* applicable to name suppression applied both before and after trial.⁷⁰ While there has been some recognition of the considerations relevant at different stages

⁶⁸ See, for example, New Zealand Herald, above n 2.

⁶⁹ Herein, for the purposes of convenience, referred to as the “stages of a case”. Often, they have been demarcated further – see Part IV C 2 (c) At trial, but before conviction or acquittal. See also *R v B*, above n 32, para 25 Baragwanath J.

⁷⁰ *Prockter v R*, above n 30, 298 Thomas J for the Court. See also, *Suppressing Names and Evidence*, above n 3, 30 where a recent, albeit tentative, view of the Law Commission was that there should not be a different approach to name suppression at the pre-trial stage/s.

of a case⁷¹ (and practically name suppression has more commonly been granted at the pre-trial stage than it has during and after trial⁷²), the predominant approach has remained the same at all stages: the presumption of open justice⁷³ must be clearly outweighed⁷⁴ by “compelling reasons” or “very special circumstances” to justify departure from open justice.⁷⁵

Recently, there has been burgeoning support from a number of decisions favouring a different approach that takes into account the stage of the case when an application for name suppression is made.⁷⁶ It has been suggested that these decisions “must be regarded as an attempt to ‘loosen’ the strict Court of Appeal tests”.⁷⁷ While this may be the beginning of “different horses for different courses”,⁷⁸ at the very least it illustrates that the significance to be placed on the stage of the case in the exercise of the discretion has received inconsistent treatment.

2 *The different stages of a case*⁷⁹

(a) Pre-trial (including the initial stage following arrest, but before the first court appearance)

⁷¹ See, for example, *Prockter v R*, above n 30, 298 Thomas J for the Court.

⁷² See, for example, *Suppression and Contempt*, above n 37, 15.

⁷³ *R v Liddell*, above n 24, 546-7 Cooke P for the Court.

⁷⁴ *Lewis v Wilson & Horton Ltd*, above n 22, para 43 Elias CJ for the Court.

⁷⁵ *Re Victim X*, above n 44, para 37 (CA) Keith J for the Court.

⁷⁶ *Suppression and Contempt*, above n 37, 15. See, for example, *X v New Zealand Police*, above n 19; *GAP v New Zealand Police* (23 August 2006) HC ROT CRI-2006-463-68; *J v Serious Fraud Office* (10 October 2001) HC AKL A126/01; *Nobilo v New Zealand Police* (17 August 2007) HC AKL CRI 2001-404-241; and *R v B*, above n 32.

⁷⁷ *Suppression and Contempt*, above n 37, 16.

⁷⁸ *Ibid*, 15.

⁷⁹ Demarcating the stages of a case into three *distinct* periods is a little artificial as they are continuously related. For example, Part (c) “At trial, but before conviction or acquittal” should be read with the understanding that suppression at this stage would as a matter of course likely also include suppression at the pre-trial stage, Part (a) “Pre-trial (including the initial stage following arrest, but before the first court appearance)”. The stages are isolated into discrete periods to emphasise that different considerations appear to operate during each period which may affect the balance to be struck in the exercise of the discretion to grant name suppression under section 140 at each particular stage.

There are no legislative restrictions on publication of identifying particulars of individuals arrested, but who have not yet appeared in court. At this stage there can be no suppression order to prohibit publication and the principal of open justice may have less force.⁸⁰ Typically, the particulars of a person arrested for, or charged with, an offence are not published before that offender appears in court.⁸¹ However publication of such detail does not breach any code of practice or legislative provision.⁸²

Publication of the name of a person arrested for, or charged with, an offence before they appear in court should be prohibited. Publication of their details pre-empts their right to apply to the court for name suppression. It has been suggested that since such an action prejudices the ability of the court to grant an application for name suppression, publication of the name of an accused before their first appearance may be a contempt of court.⁸³

In 2004 the Law Commission recommended that “publication of identifying details of a person charged with an offence before they appear in court should be prohibited unless the person consents”.⁸⁴ In the opinion of the author, this recommendation should be enacted as it promotes certainty and natural justice and protects the right of an individual to apply to the court for name suppression.

After this period, it is likely that there may also be a significant period of time following the first court appearance but before trial. It has been noted that “pre-trial publicity may be ill-informed and perhaps unjustified... There is the natural justice

⁸⁰ *Delivering Justice for All*, above n 4, 314.

⁸¹ *Ibid*, 313. See also, New Zealand Police “All Media Please Note” (19 September 2009) Press Release: “The police officer named in the NZ Herald on page 6 today [Drink-drive inquiry policeman charged www.nzherald.co.nz (last accessed 20 September 2009)] has not appeared in court yet and therefore has name suppression until he does. He has been summonsed to appear in the Auckland District Court on September 30.” Interestingly this statement seems to assume the officer in question has name suppression automatically – without court order – from the time he was arrested until his first court appearance.

⁸² *Delivering Justice for All*, above n 4, 314.

⁸³ *C v Wilson and Horton Ltd* (27 May 1992) HC AK CP 765/92. In this case, an interim injunction was granted to prevent publication of the name of a man under investigation by the Serious Fraud Office. Williams J found that there was a serious question to be tried as to whether such publication might give rise to a contempt of court. See also, Burrows and Cheer, above n 10, 343.

⁸⁴ *Delivering Justice for All*, above n 4, 314.

consideration that the accused has not had an opportunity to present the defence case”.⁸⁵ The author is of the opinion that, where appropriate, pre-trial name suppression may more readily be justified given that at this stage an accused is entitled to the presumption of innocence, and the potential for disproportionate adverse harm to be suffered from publicity at this stage is more significant.⁸⁶ However, as the case proceeds from this point, suppression may no longer be justified.⁸⁷

(b) Post trial, after conviction or acquittal

If convicted, the onus on a defendant wishing to obtain name suppression is significant – especially for a serious crime.⁸⁸ An order “will not be made unless the circumstances are quite exceptional”⁸⁹ or there are compelling reasons to justify it.⁹⁰

If acquitted, name suppression is not axiomatic. While the Court of Appeal has held that the discretion may more readily be exercised, it has also found that there may be legitimate public interest in publication of identifying particulars of an individual acquitted.⁹¹ It has been argued that it seems unfair the same threshold applies to an acquitted person applying for name suppression as it does to a convicted person – especially considering publicity can be a significant punishment and often acquittals are not as widely publicised by the media.⁹² A later observation in *Liddell* illustrates the appropriate direction that should be taken at this stage:⁹³

⁸⁵ *R v B*, above n 32, para 27 Baragwanath J.

⁸⁶ *X v New Zealand Police*, above n 19, para 22 Baragwanath J.

⁸⁷ See Part IV F Critique.

⁸⁸ *R v Liddell*, above n 24, 547 Cooke P for the Court: “...when a conviction is for [a] serious crime it can only be very rarely that the interests of the offender’s family will justify an order suppressing disclosure... of identity”.

⁸⁹ *Delivering Justice for All*, above n 4, 317.

⁹⁰ *Re Victim X*, above n 44, para 37 (CA) Keith J for the Court.

⁹¹ *R v Liddell*, above n 24, 547 Cooke P for the court. For an example of a case where suppression was refused following acquittal because of the public interest see *R v Dare* (25 June 1998) CA 195-98 (CA). See also, *R v D(G)* (1991) 63 CCC (3d) 134.

⁹² See, for example, Fiona Jackson *What’s in a name? Name Suppression and the Need for Public Interest* (LLB (Hons) Research Paper, Victoria University of Wellington, 2005) 35-36.

⁹³ *R v Liddell*, above n 24, 547 Cooke P for the Court (emphasis added).

A case of acquittal... where the *damage caused to the accused by publicity would plainly outweigh any genuine public interest*, is an instance when, depending on all the circumstances, the jurisdiction could properly be exercised.

- (c) At trial, but before conviction or acquittal

The approach to be taken during the middle of the continuum is more contentious. Two proposals have been suggested.

- (i) Suppression until the substance of the case has been 'gone into'

In 1972 the Criminal Law Reform Committee proposed legislation that precluded publication of identifying particulars of an accused until the case had been "gone into".⁹⁴ This was presumptive only and exceptions were provided to allow for publication: where an accused sought such an order; where it may lead to other victims and witnesses coming forward; where it was necessary to avoid others suffering through speculation; or where it was otherwise in the interests of justice.⁹⁵

There are a number of advantages to this approach. It avoids the difficulty surrounding the relevance of the presumption of innocence in name suppression⁹⁶ and promotes certainty and equal treatment. Similarly, it avoids the "dilemma" facing an accused seeking name suppression under the current law "knowing that the threshold... is a high one and the possibility that the application itself, if unsuccessful, may attract the very consequence it sought to avoid."⁹⁷ There are also disadvantages. An acquitted individual would be in the same position as they are under present law and the restriction limits freedom of expression and open justice. While this is a notable limitation, it is

⁹⁴ In summary cases, the point after which the prosecution has presented its case or the accused has pleaded guilty. In cases where an accused is to be tried by a jury, at the taking of depositions at a preliminary hearing. *Delivering Justice For All*, above n 4, 315.

⁹⁵ *Ibid.*

⁹⁶ See Part IV D The Presumption of Innocence.

⁹⁷ *Delivering Justice For All*, above n 4, 316.

only temporary, as the public interest in knowing the name of a person appearing before the court is “simply postponed” until the substance of the case is presented.⁹⁸

In 2004 the Law Commission recommended this proposal be adopted, but this recommendation was not accepted by the Government.⁹⁹ While the Government response may have been unfavourable, this proposal still has some enduring support.¹⁰⁰

(ii) Suppression until conviction

An alternative suggested by the Criminal Law Reform Committee, was a prohibition on publication until conviction. This alternative was less favoured by the Committee than the first, as it was said to place too much paramountcy on the presumption of innocence and significantly infringe open justice and freedom of expression.¹⁰¹ Moreover, this may have had the practical effect of precluding any publication of the name of an acquitted individual.

Arguments in favour of this proposal focused on the effect that merely being accused of a crime can have on the reputation and livelihood of an individual. Moreover, this proposal accords with the view that publicity is a punishment and should be reserved for only those deserving to be reprimanded.¹⁰² Proponents point out these effects may continue even if an accused is later acquitted and that publicity following an acquittal “is rarely as extensive” as publicity surrounding the original appearance before the court.¹⁰³ Similarly, the proposal is said to promote certainty and equal treatment of every person

⁹⁸ Ibid.

⁹⁹ Ministry of Justice *Government Response to Law Commission Report on Delivering Justice for All* (Government Printer, Wellington, 2004).

¹⁰⁰ Butler and Butler, above n 57, 329. “In the authors’ view these [referring as well to the recommendation discussed in Part IV C 2 (a) Pre-trial (including the initial stage following arrest, but before the first court appearance)] recommendation [sic] are a step in the right direction since at these points in time more harm can be done to the accused and his [sic] family than there is a public interest in knowing his or her name.”

¹⁰¹ *Delivering Justice For All*, above n 4, 315 and 317. Moreover it would have the ‘practical difficulty’ of making any accompanying reporting of the trial more difficult.

¹⁰² Jessica Meech, above n 23, 67.

¹⁰³ *Delivering Justice For All*, above n 4, 317. See also, *M v Police*, above n 1, 16 Fisher J: “[T]he stigma associated with a serious allegation will rarely be erased by a subsequent acquittal”.

accused of a crime, whereas under the present law “only some people [are] ever likely to gain the benefits of name suppression”.¹⁰⁴

While both proposals of the Committee were never implemented, a provision having the same effect as the second proposal was later enacted,¹⁰⁵ albeit only in force from September 1975 until July 1976.¹⁰⁶

(iii) The quandary with the ‘before conviction or acquittal’ period

Much of the debate (and indeed difficulty) surrounding this stage has concerned the relevance of the presumption of innocence to name suppression. The tendency for name suppression to be more readily granted before, as opposed to after, conviction is often attributed to the importance of the presumption. In *M v Police* (“*M*”), Fisher J held:¹⁰⁷

[O]ne must recognise a crucial difference between the approach which is appropriate where the defendant is merely charged with an offence and the approach where he or she has been convicted. Publication of name is frequently a major and appropriate element of an offender's punishment once it is established that he or she is guilty. But punitive considerations are obviously irrelevant before conviction. At that stage the defendant is entitled to the presumption of innocence. Yet the stigma associated with a serious

¹⁰⁴ *Delivering Justice For All*, above n 4, 317.

¹⁰⁵ Criminal Justice Act 1954, s 45B (now repealed). This provision was introduced by the Labour Government in its Criminal Justice Amendment Act 1975. It overturned the presumption of openness at the pre-trial stage and provided that unless the court ordered otherwise, there was to be no publication of the names or identifying particulars of an accused, unless and until that person was found guilty and a conviction was entered by the court. Hon Dr A M Finlay (16 September 1975) 401 NZPD 4475: “[T]o say that there should be publicity because it is part of the penalty is to assume guilt right from the moment the argument is embarked upon”. See also, Michael Stace “Name Suppression and the Criminal Justice Amendment Act 1975” (1976) 16 Br J Criminol 395.

¹⁰⁶ Criminal Justice Amendment Act 1976, s 2 (now repealed). This provision was introduced by the new incoming National Government (having successfully defeated the Labour Government in the November 1975 election) and repealed section 45B of the Criminal Justice Act 1954. The National Party, both before and after the enactment of section 45B, had expressed its hostility towards the provision and intimated its intention to repeal the provision when elected to government. The party strongly subscribed to the opinion that “justice must be done openly and in public” and that society’s right to know was more important than an individual’s well-being in this context. See, for example, Rt Hon Sir John Marshall (17 April 1975) 396 NZPD 682; Hon R D Muldoon (16 September 1975) 401 NZPD 4478: “We will reverse the decision next year – that I promise...”; and Michael Stace, above n 105, 396-399.

¹⁰⁷ *M v Police*, above n 1, 15-16 Fisher J.

allegation will rarely be erased by a subsequent acquittal. Consequently when a Court allows publicity which will have serious adverse consequences for an unconvicted defendant, it must do so in the knowledge that it is penalising a potentially innocent person. That is far from saying that suppression should always be granted before guilt is established. But in my view the presumption of innocence and risk of substantial harm to an innocent person should be expressly articulated in these cases to avoid the danger that they will be overlooked.

This finding has been referred to affirmatively in a number of other cases¹⁰⁸ which “[take] the view that the principles to be applied in the application of the discretion under s 140 of the Act [are] different prior to conviction [than they are] after conviction”.¹⁰⁹ However this is not a view shared by all – some suggest the presumption is incapable of displacing the principle of open justice and right to freedom of expression before trial¹¹⁰ or that it is completely irrelevant to name suppression decisions.¹¹¹ The presumption has received inconsistent treatment.¹¹²

D The Presumption of Innocence

Section 25(c) of the BORA provides that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law. While the language of the BORA is clear, the application of the presumption to name suppression has been a difficult question, indeed the “reconciliation of the presumption of innocence with the presumption of open justice is somewhat controversial.”¹¹³

¹⁰⁸ See, for example, *S(1) and S(2) v Police* (1995) 12 CRNZ 714, 717 (HC) Neazor J.

¹⁰⁹ “*A Defendant*” v *Police* (1997) 14 CRNZ 579, 583 (HC) Doogue J.

¹¹⁰ *Prockter v R*, above n 30, 299 Thomas J for the Court: “But it is to be emphasised that the presumption of innocence [while able to be taken into account] does not in itself displace the application of the principles in *R v Liddell*”.

¹¹¹ *Suppressing Names and Evidence*, above n 3, 29.

¹¹² Compare, for example, *Prockter v R*, above n 30, and *T v Police* (7 June 2005) HC CHCH CRI-2005-409-000098. See also, Jessica Meech, above n 23, 23-29; *Bickley v Police* (3 October 1991) HC CHCH AP 224/91; and Katrina Jones, above n 27, 25 where, after noting the inconsistency, the author said: “It appears the judiciary has passed the resolution of a difficult issue [the relevance of the presumption of innocence] onto the legislature. This should be an indication to the legislature that the controversial issue of name suppression principles demands debate in parliament for clarification as opposed to it remaining with an unwilling judiciary.”

¹¹³ Burrows and Cheer, above n 10, 338.

Precedent concerning the presumption of innocence in name suppression reveals it has been inconsistently applied. While many cases following *M* have given the presumption much prominence in the balance to be struck prior to conviction,¹¹⁴ the Court of Appeal held in *Prockter*:¹¹⁵

We have no doubt that the principles in *R v Liddell* referred to above apply to the question of name suppression both before and after trial and that those principles remain the starting point in considering any application for name suppression. The key difference is that, whereas the presumption of innocence is not relevant following a conviction, it is ***undoubtedly a factor which must be taken into account when the question arises before trial***. What weight the presumption of innocence is then to be given will depend on the particular circumstances of the case. But it becomes a ***significant factor*** to be weighed in the balance against the principles which favour open reporting.

[...]

But it is to be emphasised that the ***presumption of innocence does not in itself displace the application of the principles in R v Liddell***.

Prockter has been interpreted to have accorded the presumption less weight than it received in *M*. However many cases since *Prockter* appear to have deviated from this view¹¹⁶ and found that the presumption is a material factor in the balance that must be struck in pre-trial name suppression.¹¹⁷ In 2004 the Law Commission observed that it was “difficult to discern from the decisions after *Proctor* the weight to be given to the presumption of innocence and in what circumstances the balance will tilt”.¹¹⁸ It expressed concern that “since the decision in *Proctor v R*,¹¹⁹ the law relating to pre-trial suppression of an accused’s name [does] not appear to have given sufficient recognition

¹¹⁴ See, for example, *S(1) and S(2)*, above n 108.

¹¹⁵ *Prockter v R*, above n 30, 298-299 Thomas J for the Court (emphasis added).

¹¹⁶ See, for example, *Serious Fraud Office v B & K* [1999] DCR 621 (DC); *Wellington Newspapers v XI* [2000] DCR 161 (DC); *J v Serious Fraud Office*, above n 76; *R v B*, above n 32; *GAP v Police*, above n 76; and *X v New Zealand Police*, above n 19.

¹¹⁷ *Delivering Justice For All*, above n 4, 315.

¹¹⁸ Indeed since the expression of this view in 2004 more cases have placed real significance on the presumption of innocence – see, for example, *R v B*, above n 32; *GAP v Police*, above n 76; *Nobilo v Police*, above n 76; and *X v New Zealand Police*, above n 19.

¹¹⁹ *Prockter v R*, above n 30. The case is referred to in some reporter series as *Proctor v R*.

to the presumption of innocence".¹²⁰ Indeed this was a sentiment shared by some members of the judiciary.¹²¹

In the opinion of the author, the authorities are not necessarily irreconcilable. *Prockter* notes that the presumption is a "significant factor to be weighed" against open justice, that it may be afforded great weight "depend[ing] on the particular circumstances" and that it is "undoubtedly a factor which must be taken into account" in pre-trial applications.¹²² While *Prockter* goes further and clarifies that the presumption "does not in itself displace the application of the principles in *R v Liddell*",¹²³ this is not inconsistent with authorities that have considered the presumption a more material factor.¹²⁴ Those authorities do not assert that the presumption alone 'tips the scales' towards suppression, but that it must be a factor considered important – with others – in the balancing exercise.¹²⁵ The author suggests that the difficulty is not a perceived inconsistency of these authorities with the decision in *Prockter*, but just that the presumption has often not received sufficient consideration in some cases.

2 Law Commission and the difficulty with the presumption of innocence

In 2008 the Law Commission reversed its 2004 position on the relevance of the presumption:¹²⁶

¹²⁰ *Suppressing Names and Evidence*, above n 3, 29. See also Claire Baylis, above n 11, 211: "The affects of publicity can be a very severe punishment which is not imposed by Parliament and the courts, and which can affect people even before their case has been decided. The presumption of innocence has been disregarded in this area."

¹²¹ See, for example, *X v New Zealand Police*, above n 19, para 11 Baragwanath J: "...this interest has sometimes received limited attention"; *R v B*, above n 32, para 41 Baragwanath J where the same statement was made; and *S(1) and S(2)*, above n 108, 718 Neazor J: "...too much weight was given in the District Court to the primacy of publicity and not enough to the presumption of innocence."

¹²² *Prockter v R*, above n 30, 298 Thomas J for the Court.

¹²³ *Ibid*, 299 Thomas J for the Court.

¹²⁴ See, for example, *Serious Fraud Office v B & K*, above n 116; *Wellington Newspapers v XI*, above n 116; *J v Serious Fraud Office*, above n 76; *R v B*, above n 32; *GAP v Police*, above n 76; and *X v New Zealand Police*, above n 19. See also, *Delivering Justice For All*, above n 4, 315.

¹²⁵ Indeed if it did tip the scales alone, these authorities would stand for the proposition that all accused persons are entitled to suppression until conviction (as all are entitled to be presumed innocent until proven guilty). These decisions do not assert this and suppression until conviction is not the law in New Zealand.

¹²⁶ *Suppressing Names and Evidence*, above n 3, 29.

[The Law 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 proved beyond a reasonable doubt. It does not imply that for all purposes the accused is to be treated as factually innocent of the charge. If that were the case, few accused would be remanded in custody pending trial.

The problem with the relevance of the presumption is that a charge does not legally imply guilt – publicity about a charge can only lead people to make their own inferences of factual guilt which may strictly not offend the presumption of innocence.¹²⁷ Instead it has been suggested that the reason why open justice is more readily offset – and name suppression more likely granted – before, rather than after, conviction is because the potential for hardship to be suffered by an accused from publicity *at this stage* is greater than the potential for hardship after conviction or acquittal.¹²⁸

In the opinion of the author, the 2008 view of the Commission is misguided; the presumption of innocence has real relevance in name suppression.

3 *Relevance of the presumption of innocence*

The presumption of innocence is much more than a procedural “rule about how trials are run”. Although the presumption appears in section 25 of the BORA under the heading “minimum standards of criminal procedure”, it is described as a right in that section and understood to be a right (as opposed to merely a rule) that every individual has affirmed by the BORA. Section 25 extends to other minimum standards of criminal procedure, including the right to a fair and public hearing,¹²⁹ and these other provisions are similarly understood to be affirming rights.

¹²⁷ Indeed as *Suppressing Names and Evidence*, above n 3, 25 notes: “[I]f the media were to suggest that a person who had been charged, but not convicted of an offence, was guilty, they would be liable for contempt, and risk defamation proceedings in the event of an eventual acquittal”.

¹²⁸ *Ibid*, 29.

¹²⁹ Bill of Rights Act 1990, s 25(a).

The importance and purposes of the presumption are well articulated in the Supreme Court of Canada decision, *R v Oakes*:¹³⁰

The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

Moreover, the importance of the presumption is emphasised by its application to all stages of the criminal justice process. While some commentators have suggested "the presumption can only sensibly have application at trial",¹³¹ the presumption has been held to be relevant "not only to an accused's position during trial, but, equally ... relevant to pre-trial matters (such as bail), post-trial matters (such as sentencing) and even to the substantive content of offences".¹³² Indeed as Baragwanath J observed in *R v B and X v New Zealand Police*:

It is of interest to compare the case of bail. Although other considerations may cause bail to be declined, because of the presumption of innocence the penalty of being detained is the subject of a powerful adverse presumption both at common law... and under s 7 of the Bail Act 2000. While often determinative in bail cases, in suppression applications this interest has sometimes received limited attention.¹³³

¹³⁰ *R v Oakes* (1986) 26 DLR (4th) 200, 212-213 (SCC) Dickson CJ for the majority.

¹³¹ Butler and Butler, above n 57, 827. See also Claire Baylis, above n 11, 203.

¹³² Butler and Butler, above n 57, 827. See also, Bron McKillop "The Position of Accused Persons under the Common Law System in Australia (More Particularly in New South Wales) and the Civil Law System in France" (2003) 26 U NSWLR [2003] 515 where it is recognised that the presumption of innocence "is of importance in relation to pre-trial matters such as prejudicial media reporting and entitlement to bail."

¹³³ *R v B*, above n 32, para 41 Baragwanath J.

Certainly physical detention is a more potent interference with human dignity than something that is said. *But reputation matters. The indignity of subjection to the criminal process, which is part of the deterrent of being proved to have offended, should not follow simply as of course at a stage when the offence has not been proved.*¹³⁴

The demarcation between factual and legal guilt is not as distinct in the real world as it may appear in legal texts¹³⁵ – this is a further reason why the presumption is important and has real relevance in name suppression. The effects of publicity can be a “very severe punishment which is not imposed by Parliament and the courts, and which can affect people even before their case has been decided”.¹³⁶ While the rhetoric of the justice system “is that an accused is presumed innocent until proven guilty, the punishment of publicity can be meted out before a verdict is reached, with often long lasting effects.”¹³⁷ It must be considered whether this harmful publicity, “like the rest of the punishment, should be reserved for those who have been proved guilty of the crime”.¹³⁸ If an accused is later acquitted they can already have suffered severely from the adverse publicity.¹³⁹ Moreover, “acquittals are often not widely publicised, and some people may think that the person was guilty, but somehow managed to get off on a

¹³⁴ *X v New Zealand Police*, above n 19, para 25 Baragwanath J (emphasis added).

¹³⁵ The author notes that while the Law Commission did recognise this point, it was not considered in great detail: *Suppressing Names and Evidence*, above n 3, 29.

¹³⁶ Claire Baylis, above n 11, 211.

¹³⁷ *Ibid*, 203.

¹³⁸ Heleen Scheer “Publicity and the Presumption of Innocence” (1993) 52 CLJ 37, 39. See also, *ibid*.

¹³⁹ Roderick Munday “Name Suppression: An Adjunct to the Presumption of Innocence and to Mitigation of Sentence (1991) Crim LR 680, 756: “[there are two reasons why the naming of a defendant is not crucial to the exercise of justice in the open] first, the stigma and intense anguish occasioned by the mere fact of a charge having been laid against a named party and, secondly, the residual stigma that adheres to that individual even after acquittal. This latter feeling, that there is no smoke without fire, cannot be discounted. The suspicion is conveniently fuelled by a system where *convictions are only returned following the highest measure of proof*...and [it can] be compounded by media failure to report an acquittal as prominently as an initial charge” (emphasis added).

'technicality', as there is 'no smoke without fire'".¹⁴⁰ In light of this it has been said that:¹⁴¹

It is a little paradoxical that a system of trial designed to give the accused the benefit of the doubt in court is almost bound to ensure that the public does the opposite.

The primary deduction that everyone draws from the presumption of innocence is obviously that at trial the defendant gets the benefit of the doubt. Yet there are, in relation to unconvicted and acquitted persons, other deductions that can be drawn from it. It seems that common lawyers, who are the first to say that the presumption of innocence is central to their system, seem to draw fewer deductions from it than are often drawn elsewhere. As Glanville Williams says of our treatment of unconvicted persons in the Proof of Guilt, 3rd ed. (London 1964) p. 184, "it is a repudiation of the philosophy behind the supposed presumption of innocence".

Name publication of an accused – especially at the pre-trial stage – is arguably a serious encroachment on their right to be presumed innocent.¹⁴² Blind application of a high threshold to displace the principle of open justice without consideration of the presumption would seemingly prevent an accused from having the opportunity to obtain the full benefit of their right to be presumed innocent.¹⁴³ To manifest the presumption with any real value, it must always form part of the assessment of a request for name suppression of an accused.¹⁴⁴ An accused should not suffer unjust punishment.¹⁴⁵

¹⁴⁰ Claire Baylis, above n 11, 203. See also, Heleen Scheer, above n 138, 39; and *ibid*, 757: "Damage, therefore may be inflicted by identifying a party whom the law presumes innocent, regardless that it is done in the name of some greater general good...The true object of the press rather too often is to pad out the local rag, or to indulge the appetites of readers avid for a scandalous or grotesque fait divers... It is not an essential prerequisite of a criminal justice system that suspects be always identified publicly. Nor need anonymity herald the end of a civilized and publicly accountable justice system."

¹⁴¹ Heleen Scheer, above n 138, 39, first citing Nigel Walker "Curiosities of Criminal Justice" (1975) XLVIII *Police Journal* 9 (emphasis added).

¹⁴² Fiona Jackson, above n 92, 35; and Claire Baylis, above n 11, 203.

¹⁴³ Indeed some have gone further: see, for example, Fiona Jackson, above n 92, 35: "...there should be a requirement of "compelling reasons", such as genuine public interest reasons, in order to disallow an accused person's application for name suppression because of the importance of the presumption of innocence."

¹⁴⁴ Katrina Jones, above n 27, 18.

¹⁴⁵ See also, albeit in a slightly different context, *R v Sila* (6 May 2008) HC CHCH CRI 2007-009-006120, paras 19 and 27 Fogarty J: "Because of the presumption of innocence, I am of the view that as a matter of principle the publicity adverse to the accused should be limited, as a precaution, to avoid imposing an

While some assert open justice is more readily offset before (rather than after) conviction because the potential for hardship to be suffered at this stage is greater,¹⁴⁶ this is because a person has the right to be presumed innocent during this stage. Simply put, the potential for hardship to be suffered is greater at this point *because* an accused may endure harm that is severe and disproportionate considering they may not be guilty of the offence. Where the damage will be significant and disproportionate, suppression to minimise the harm may outweigh the principle of open justice.¹⁴⁷ Nevertheless, whatever the exact justification, it is apparent the factors relevant at each stage of a case differ.

E Does the Threshold Differ between the Different Stages of a Case?

There has been some dissatisfaction over the high threshold required for name suppression at any stage of a case. In *Lewis v Wilson and Horton Ltd* (“*Lewis*”), the Court of Appeal reiterated that the balance must come down “clearly in favour of suppression” before the presumption in favour of open reporting is overcome.¹⁴⁸ While the High Court has found that a requirement for ‘compelling reasons’ to justify name suppression may set the test higher than that proposed by the Court of Appeal in *Lewis*,¹⁴⁹ the Court of Appeal in *Re Victim X* went further and found that “compelling reasons” or “very special circumstances” were required to justify a departure from the presumption of open justice.¹⁵⁰

unjust punishment. [...] ... I must ensure that I do not impose a punishment on an accused person prior to conviction”.

¹⁴⁶ *Suppressing Names and Evidence*, above n 3, 29.

¹⁴⁷ *T v Police*, above n 112, para 24 Pankhurst J: “The principle of open justice is of lesser significance where an interim order is made in recognition of the fact that at least until guilt is determined there are legitimate private interests which warrant protection in the meantime”.

¹⁴⁸ *Lewis v Wilson & Horton Ltd*, above n 22, para 43 Elias CJ for the Court.

¹⁴⁹ *Abbott v Wallace* [2002] NZAR 95, para 34 (HC) Salmon and Potter JJ.

¹⁵⁰ *Re Victim X*, above n 44, para 37 (CA) Keith J for the Court.

Recently some decisions have suggested that the threshold differs between the stages of a case¹⁵¹ because “the opposing values cannot be resolved at a general level”.¹⁵² In *X v New Zealand Police*, Baragwanath J held:¹⁵³

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 section 140 is not whether “there are exceptional reasons.” It is simply whether departure from that starting point is justified on an overall balancing of the relevant factors in accordance with the test of what at this stage the interests of justice require.

This approach recognises that open justice is the starting point but may not necessarily be the finishing point – an assessment must be made on the specific facts, and particular stage, of the case.¹⁵⁴ While the relevant factors at each stage will vary with every case,¹⁵⁵ considerations such as the presumption of innocence, privacy and personal dignity “are not pieties to be intoned and disregarded in suppression applications but factors which may warrant substantial weight when the ultimate evaluation is performed”.¹⁵⁶

Although this approach has been criticised as an “abandonment of a high threshold in favour of a vague ‘overall balancing’ test” which could lead to more name suppression applications being granted,¹⁵⁷ it has been followed in subsequent cases. In both *GAP v New Zealand Police* and *Nobilo v New Zealand Police* the High Court similarly found that the presumption of open justice may more easily be displaced when

¹⁵¹ Suppression and Contempt, above n 37, 15. See, for example, *X v New Zealand Police*, above n 19; *GAP v New Zealand Police*, above n 76; *J v Serious Fraud Office*, above n 76; *Nobilo v New Zealand Police*, above n 76; and *R v B*, above n 32.

¹⁵² *R v B*, above n 32, para 29 Baragwanath J.

¹⁵³ *X v New Zealand Police*, above n 19, para 34 Baragwanath J.

¹⁵⁴ *Ibid*, para 8 Baragwanath J.

¹⁵⁵ See for example, *ibid*, para 16 Baragwanath J: “The importance of publicity in preserving the integrity of the evidentiary process, and the role of the media as surrogates for the public...are of particular application at the second stage.” See also, *ibid*, paras 11-12, 15-19, 22, 29, 35-38 Baragwanath J for other considerations that may be relevant at each stage, such as: the potential for severe hardship to be suffered, family and health considerations, open justice interests, privacy and the presumption of innocence.

¹⁵⁶ *Ibid*, para 29 Baragwanath J.

¹⁵⁷ Suppression and Contempt, above n 37, 16.

name suppression is sought pre-trial as opposed to after conviction and tests requiring 'compelling reasons' or 'very special circumstances' to displace the presumption of open reporting are only appropriate during or post-trial.¹⁵⁸ In *R v B* the Court of Appeal described what is required as "a careful appraisal of each of the competing values and their importance within the context of the particular facts and circumstances of the case".¹⁵⁹ The presumption of innocence and adverse consequences of publication are among the factors to be considered and the process itself is dynamic; "the position may change as the pre-trial processes take place".¹⁶⁰

F Critique

1 A balancing exercise

The principles espoused in *Liddell* are fundamental for all name suppression applications. However the context of that decision must be remembered:¹⁶¹

The judgment in *Liddell* was expressed in terms of general application, but the Court was dealing with a post-conviction suppression and not with particularity with the matters relevant to suppression of names in other cases. The emphasis given in *Liddell* to the presumption in favour of openness does not exonerate a Court from making the difficult balancing of interests which may arise in a pre-conviction application. Whilst the New Zealand Bill of rights enshrines the basic value of freedom to receive and impart information, it also enshrines the right, in relation to determination of a charge, to be presumed innocent until proven guilty according to law (s 25(d)) [sic – s 25(c)]. In ancillary aspects of the criminal process each of these rights has to be taken in balance.

In pre-conviction applications, the presumption of innocence is a relevant factor, and important individual right, that must not be overlooked.¹⁶²

¹⁵⁸ Ibid.

¹⁵⁹ *R v B*, above n 32, para 29 Baragwanath J.

¹⁶⁰ Ibid, para 57 Baragwanath J.

¹⁶¹ *S(1) and S(2)*, above n 108, 718 Neazor J.

¹⁶² Ibid; *M v Police*, above n 1; *R v B*, above n 32; *J v Serious Fraud Office*, above n 76; and *Prockter v R*, above n 30.

It must always be remembered that the exercise of the discretion in section 140 is fundamentally a balancing exercise. Similarly it ought to be recognised that the principle of open justice is so essential to our justice system that publication should always be the norm and suppression must be the exception. However, placing too much emphasis on thresholds requiring “compelling reasons” or “very special circumstances” can distract from the need to undertake a considered balancing assessment of the particular circumstances in the case. Blind application of such standards should be avoided. While they may be appropriate in some, if not most, instances – for example in relation to an application for name suppression of a convicted defendant – such a standard may be inappropriate in other circumstances. An objective evaluation of the competing factors¹⁶³ will lead the court to where the balance should fall, a process familiar from BORA jurisprudence.¹⁶⁴

The Judge must identify and weigh the interests, public and private, which are relevant in the particular case. It will be necessary to confront the principle of open justice and on what basis it should yield. And since the Judge is required by s 3 to apply the New Zealand Bill of Rights Act 1990, it will be necessary for the Judge to consider whether in the circumstances the order prohibiting publication under s 140 is a reasonable limitation upon the s 14 right to receive and impart information such as can be demonstrably justified in a free and democratic society (the test provided by s 5). Given the congruence of these important considerations, the balance must come down clearly in favour of suppression if the prima facie presumption in favour of open reporting is to be overcome.

Moreover, it must be recognised that any balancing exercise is inevitably dynamic – it will vary with the different considerations relevant at the particular stage of the case at which the application is made, and indeed even within each stage¹⁶⁵ of a case.¹⁶⁶

¹⁶³ *R v B*, above n 32, para 3 Baragwanath J.

¹⁶⁴ *Lewis v Wilson & Horton Ltd*, above n 22, para 43 Elias CJ for the Court. Though the author notes that this statement does not identify the other side to be balanced – for example, the presumption of innocence and overriding requirement that the trial be fair: see, for example, *R v B*, above n 32, para 3 Baragwanath J. See also, on a separate but related point, Jessica Meech, above n 23, 30 and *Media Law Journal* www.medialawjournal.co.nz (last accessed 23 September 2009) where it is suggested that too often a Bill of Rights Act 1990 analysis is missing from judgments.

¹⁶⁵ *R v B*, above n 32, para 57 Baragwanath J: “It is to be borne in mind that the process is dynamic; the position may change as the pre-trial processes take place.”

¹⁶⁶ *Ibid*, para 60 Baragwanath J. See also, Simon Mount, above n 2, 437: “...the presumption of innocence may carry different weights at different stages in the criminal process...”

(b) the principles that apply to the initial stages of a case, where the accused has no opportunity to offer a defence, may well assume a very different shape when the defence is able to present its side. The reason for the distinction among the three stages of a case – pre-trial, trial and post-trial – is that what may be unfair publicity at the first stage may be necessary at the second to permit proper reporting of the trial and be fully justified by the verdict that marks the third stage;

The exercise of the discretion under section 140 is simply an objective assessment of whether departure from the starting point of open justice is justified on an overall balancing of the relevant factors in accordance with the test of what, at the particular stage of the case, the interests of justice require.¹⁶⁷ While at some stages it may require “compelling reasons” or “very special circumstances”, this may not be necessary at other points.

2 *A note on names*

It is important to note the *actual* effect of name suppression on open justice:¹⁶⁸

[N]ame suppression is *not* the same as holding the proceedings *in camera*.¹⁶⁹ It is still possible to go and watch the proceedings, and it is also still possible to publish information about them. The only limitation is that the press cannot print the name of the accused. But surely a report can still be “fair and accurate” without the name of the accused but with, for example, initials, and enables the public to provide “a safeguard against judicial arbitrariness or idiosyncrasy”.

Name suppression does not preclude the media from reporting on a case nor prevent the public from attending the proceedings; it only restricts the media from

¹⁶⁷ *X v New Zealand Police*, above n 19, para 34 Baragwanath J.

¹⁶⁸ Heleen Scheer, above n 138, 38 (emphasis in the original). Naturally this statement would apply with equal force to not only name suppression of an accused, but of any other person “connected with proceedings” under section 140.

¹⁶⁹ Where the court considers it desirable, in the interests of justice or in order to prevent undue hardship to any person, to order certain persons or all persons except those specified to remove themselves from the court room during proceedings. For a discussion of some of the principles of *in camera* proceedings see *Paraha and ors v New Zealand Police*, above n 60, para 25 Heath J.

publishing the name of the suppressed party. Name publicity can significantly impact an individual and those connected with them. So much so that many, while acknowledging the two aspects of open justice, question whether the principle justifies wide (and sometimes intense) media publicity of all names – especially perhaps, for an accused.

It is often said the public interest provides this justification. While this may be correct, a distinction ought to be drawn between “cases of mere curiosity and cases where the press seeks to publish information or comment about a matter of genuine public interest.”¹⁷⁰ In the case of an accused, there may be some instances where there is “no relevant public interest or need to know that this [person] has been charged”.¹⁷¹ Name suppression is only granted where an individual can demonstrate that their circumstances are sufficient to overcome the presumption of open justice. While the public have a right to receive information of *any kind*,¹⁷² where their interest may only be mere curiosity and there are other significant factors pointing towards suppression, name suppression may be a justified limitation on freedom of expression and open justice. Indeed, some have put it more candidly:¹⁷³

[T]he integrity of the justice system and the right to freedom of expression do not require the reporting of the full personal details of parties involved in Court proceedings (this includes the names of the accused in criminal trials) since the wellbeing of the parties and their families is of paramount importance.

Moreover, justice can be done without names. Although some may assert the benefit of open justice is reciprocal – in that both the public and defendant have an interest in ensuring proceedings are open and fair – name suppression does not preclude the fair and proper administration of justice. The court is still open;¹⁷⁴ reporting is only narrowly restricted. Furthermore, name suppression may not be permanent – therefore

¹⁷⁰ *Newspaper Publishers Association of New Zealand (Inc) v Family Court* [1999] 2 NZLR 344, 352 (HC) Pankhurst and Chisholm JJ.

¹⁷¹ *R v H* [1996] 2 NZLR 487, 489 (HC) Baragwanath J. See also, Katrina Jones, above n 27, 19: “Society’s curiosity with names should not outweigh the individual right to the presumption of innocence.”

¹⁷² Bill of Rights Act 1990, s 14 (emphasis added).

¹⁷³ Butler and Butler, above n 57, 338. See also John Burrows “Media Law” (2004) NZLRev 787, 797.

¹⁷⁴ *X v New Zealand Police*, above n 19, para 17 Baragwanath J: “Suppression applications by contrast [to bail hearings] are dealt with in open court and the interest of open justice is correspondingly enhanced.”

granting name suppression for an accused pre-trial, for example, may only postpone publication and the interests of open justice can still be met.¹⁷⁵ The process is dynamic; as the case proceeds to the next stage name suppression may no longer be justified.

The nature of the public interest and value in publication of a name must be considered in the discretionary exercise of section 140. Indeed, this consideration may be particularly pertinent for name suppression of parties other than defendants who are 'connected with proceedings'.¹⁷⁶

G Possible Approaches

Whatever the correct evaluation of the authorities, there appears to be some inconsistency and divergence in approach to section 140. There are a number of possible approaches that could be adopted.

1 Law Commission

In 2008 the Law Commission suggested a different approach from its earlier recommendations.¹⁷⁷

The Commission suggested three grounds that should operate to rebut the presumption of open justice in name suppression applications: "the risk of prejudice to a fair trial; undue hardship to the victim; and the overall interests of justice".¹⁷⁸ The Commission left open whether the final ground, the overall interests of justice, should be explicated by an exhaustive or non-exhaustive list of factors.¹⁷⁹

The Commission also expressed a tentative view that the particular considerations relevant at the pre-trial stage did not require a different approach to name suppression to

¹⁷⁵ *R v B*, above n 32, para 2 Baragwanath J.

¹⁷⁶ See Parts VI C 2 (c) Public interest and justice without a name; and V D 2 Policy.

¹⁷⁷ See Part IV C 2 The different stages of a case.

¹⁷⁸ *Suppressing Names and Evidence*, above n 3, 19.

¹⁷⁹ *Ibid*, 20

be used during this period.¹⁸⁰ The author notes that this conclusion may have been influenced by the position taken by the Commission as to the relevance of the presumption of innocence.¹⁸¹

2 *South Australia*

A unique approach has been taken in South Australia.¹⁸² Section 69A of the Evidence Act 1929 (SA) provides two grounds under which a suppression order may be made.¹⁸³ The provision is detailed and provides some guidance to assist in the exercise of the discretion.¹⁸⁴

Additionally, media that report criminal proceedings against an identified person before the result is known must publish a fair and accurate report of the result of the proceedings if the accused is ultimately acquitted.¹⁸⁵ Moreover, this subsequent report must be of similar prominence to the earlier report and published as soon as practicable after the determination of the proceedings. There are penalties for not following these requirements.¹⁸⁶

3 *Evaluation and suggested provisions*

The author agrees with the Commission that there is considerable merit in setting out the grounds for name suppression in legislation. The grounds proposed by the Commission are adequate and the author is of the opinion that the 'overall interests of justice' ground should not be defined given the considerable diversity of factors this

¹⁸⁰ Ibid, 30.

¹⁸¹ See Part IV D 2 Law Commission and the difficulty with the presumption of innocence.

¹⁸² Evidence Act 1929 (SA). See Part X C Appendix Evidence Act 1929 (SA), ss 69A, 70, 71B.

¹⁸³ Evidence Act 1929 (SA), s 69A(1). These grounds are: to prevent prejudice to the proper administration of justice; and to prevent undue hardship to an alleged victim, witness or potential witness, or a child. They are similar to the grounds suggested by the Law Commission in 2008: see Part IV G 1 Law Commission.

¹⁸⁴ Evidence Act 1929 (SA), s 69(2).

¹⁸⁵ Evidence Act 1929 (SA), s 71B(1).

¹⁸⁶ Ibid.

category may envelope¹⁸⁷ – a level of discretion must remain in order to address different cases that may come before the court. While the author agrees with the tentative opinion of the Commission insofar as it views a separate and different approach to name suppression during the pre-trial stage unnecessary, the author does believe that any approach to name suppression for defendants in criminal proceedings must take into account the stage of the case at which the application is made. The author acknowledges that while this may mean the *approach* is no different, the *practical exercise of the discretion* may differ. The author believes the failure of the Commission to acknowledge the relevance of the stage of a case as a necessary factor and its omission to provide further guidance to assist the court in the exercise of its discretion are shortcomings of the proposal.

The South Australian approach, with its additional reporting requirements on publishers, more adequately recognises the potential for publicity to cause significant harm to a defendant – especially one later acquitted. It seemingly seeks to ensure that all judicial proceedings are publicly reported, even when some individuals may not deserve the punishment that may cause, but seeks to alleviate this potential harm by ensuring the results of proceedings are equivalently published. Moreover, it provides clear grounds for when name suppression may be granted and a useful level of guidance to assist the court in its discretion. However it makes no explicit mention of the relevance of the stage of the proceedings and the presumption of innocence and may therefore fail to recognise that publicity, even if later acquittal is reported, may unjustly punish an accused.¹⁸⁸ Furthermore, it may be administratively cumbersome for the court to patrol the reporting of *all* proceedings by *all* media organisations to ensure that they publish “as soon as practicable after the determination of the proceedings” a “fair and accurate report of the result of the proceedings with reasonable prominence having regard to the prominence of the earlier report”.¹⁸⁹

¹⁸⁷ See, for example, *Suppressing Names and Evidence*, above n 3, 20 where the Law Commission discusses some of these factors.

¹⁸⁸ See Part IV D 3 Relevance of the presumption of innocence.

¹⁸⁹ Evidence Act 1929 (SA), s 71B(1). A balanced job, in fairness, a responsible (and ethical) media organisation should be doing properly already. Though outside the scope of this paper, the author notes –

While both approaches have their advantages, a better approach may go further to acknowledge that it is imperative to consider the stage of the case at which the application is made and provide more guidance to assist the court in the exercise of its discretion. The process is dynamic, suppression at one stage, and its temporary infringement on freedom of expression and open justice, may be inappropriate at another.¹⁹⁰ Although the author sees significant merit – particularly in terms of certainty – in the 2004 Law Commission recommendation,¹⁹¹ the author prefers the presumption of open justice to not be reversed at all stages and favours an approach which considers “whether departure from that starting point is justified on an overall balancing of the relevant factors in accordance with the test of what at this stage the interests of justice require”.¹⁹²

The author suggests the following provisions are more suitable:

Section 140A Publication of the identifying particulars of a person charged with an offence before first court appearance prohibited

Except as otherwise expressly provided in any enactment, publication of the name, address, occupation or any identifying particulars of a person charged with an offence before they appear in court is prohibited unless that person consents to publication.

Section 140B Court may prohibit publication of identifying particulars of defendant

- (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 any offence, of the name, address or occupation of any defendant, or any particulars likely to lead to any such person’s identification, if that court is satisfied that publication would –
 - (a) for any reason not be in the interests of justice;
 - (b) cause undue hardship to the complainant or victim; or
 - (c) cause a risk of prejudice to a fair and impartial trial.

- (2) In considering whether to make such an order, the court must recognise –
 - (a) that a primary objective in the administration of justice is to safeguard the public interest in open justice and the consequential right of the news media to publish information relating to court proceedings; and

with interest – that it is unclear how the provision would address publishers outside the State of South Australia, both within other States in Australia and internationally.

¹⁹⁰ See also, *Re Victim X*, above n 44, para 8 (HC) Hammond J: “it must be...that a suppression order, even if validly granted at a particular time, should continue for no longer, and be cast no more widely, than is appropriate. The Court must itself therefore have an overarching responsibility in this respect to see that suppression orders, by the time a trial is reached, are not inappropriately maintained in place.”

¹⁹¹ See Part IV C 2 (c) (i) Suppression until the substance of the case has been ‘gone into’.

¹⁹² *X v New Zealand Police*, above n 19, para 34 Baragwanath J. See Part IV E Does the Threshold Differ between the Different Stages of a Case? for further description of the factors relevant at each stage.

- (b) the stage of the proceedings at which the application is made.
- (3) In considering whether to make such an order, the court shall consider –
 - (a) whether there is a real and substantial risk that the defendant would suffer significant and disproportionate harm if their identity was disclosed;
 - (b) whether effective alternatives are available to protect the identity of the defendant;
 - (c) the impact of the proposed order on the freedom of expression of those affected by it;
 - (d) in pre-conviction (or acquittal) applications, the right of the defendant to be presumed innocent until proved guilty according to law;
 - (e) whether the public interest requires that the identifying particulars of the defendant not be suppressed;
 - (f) the salutary and deleterious effects of the proposed order; and
 - (g) any other factor that the judge or justice considers relevant at this stage of the proceedings.
- (4) The court may only make a suppression order if it is satisfied that in the circumstances there is a sufficient threat to the interests of justice, to a risk of prejudice to a fair and impartial trial, or to the undue hardship to the complainant or victim, to justify the making of the order in the particular case.

H Conclusion

Section 140 confers a broad discretion to grant a defendant name suppression. The lack of direction from the legislature is unhelpful; it is a difficult enough balance to strike. There is a notable amount of inconsistency and divergence in approach to the discretion. Moreover, a number of difficult issues – particularly the relevance of the presumption of innocence and stage of proceedings to the assessment – need to be clarified. There is a real need for the legislature to provide more guidance in the provision to assist the court in the exercise of its discretion.

V THIRD PARTIES – EXACTLY WHO IS “CONNECTED WITH THE PROCEEDINGS”?

Section 140 allows the court to make an order prohibiting publication of identifying particulars of “any other person connected with the proceedings”.

This portion of the paper addresses the application of section 140 to individuals other than a defendant, who are connected to (and/or directly affected by) the

proceedings. The first part of this portion of the paper examines the extent to which third parties come within the phrase "connected with the proceedings". The second part of this portion of the paper addresses the application of this section to victims and witnesses who are "connected with the proceedings".¹⁹³

A Introduction

The ability of the court to suppress identifying particulars of affected third parties ought to be reconsidered. While frequently the phrase "connected with the proceedings" has been taken to encompass persons connected to proceedings only by virtue of their relationship to a defendant, it has most recently been interpreted to exclude these individuals and be limited to only those *actually* connected to the proceedings. These two different interpretations have arisen from case law.¹⁹⁴

B Wide Interpretation

In *Liddell* the Court of Appeal held that the wife and sons of an accused who had been convicted of sexual offences were persons "connected with the proceedings" and that there was no reason why they "should not receive *such protection as the statute enables*".¹⁹⁵ The Court made what it called a "much more limited order" and prohibited the publication of their names and identifying particulars, even though the name of the accused was not suppressed.¹⁹⁶

In *A Defendant v Police* ("A Defendant") the Court refused to grant name suppression to a District Court Judge charged with numerous sexual offences.¹⁹⁷ However, the Court made an order prohibiting publication of the identifying particulars

¹⁹³ See Part VI Victims and Witnesses – Are we being Unfair?

¹⁹⁴ *Suppressing Names and Evidence*, above n 3, 38.

¹⁹⁵ *R v Liddell*, above n 24, 546 Cooke P for the Court (emphasis added).

¹⁹⁶ *Ibid.*

¹⁹⁷ "A Defendant" v *Police*, above n 109, 589 Doogue J.

of his wife and children under section 140 and, to support this order, prohibited publication of the address of the accused.¹⁹⁸

While this wide interpretation encompassing persons “connected with the proceedings” only by virtue of their relationship to a defendant has been applied in cases both before¹⁹⁹ and since *Liddell*,²⁰⁰ a recent decision has rejected this interpretation in favour of a narrower version.²⁰¹

C Narrow Interpretation

In *R v Shapiro* (“*Shapiro*”), Mr Shapiro abandoned pursuit for name suppression of his own name in favour of a suppression order in relation to the identity of his employer.²⁰² Mr Shapiro was a professional musician employed by the Christchurch Symphony Orchestra (“CSO”). In 2007 he was charged with unlawful possession of explosives, weapons and ammunition.²⁰³ Both Mr Shapiro and his employer swore affidavits in support of the application indicating that “the orchestra relies heavily upon sponsorship...for its survival”, that publicity surrounding the case was placing “real strains” on that relationship, and that a number of these supporters had already expressed their concern about the association.²⁰⁴

The Court of Appeal dismissed Mr Shapiro’s appeal for its failure to surmount what it called a ‘jurisdictional barrier’.²⁰⁵ The Court did not entertain argument outside this matter including a submission by Mr Shapiro questioning whether the general public had a legitimate interest in knowing the name of an entity employing a person facing

¹⁹⁸ *Ibid.*

¹⁹⁹ See, for example, *T v Commissioner of Police* (21 November 1991) HC AK AP 282/91 where Tompkins J suppressed the name of the employer of a man charged with aggravated robbery because the interests of those directly involved with the employer could be adversely affected. The jurisdictional basis for the order was not discussed.

²⁰⁰ *Suppressing Names and Evidence*, above n 3, 38.

²⁰¹ *R v Shapiro* [2008] NZCA 151 (CA).

²⁰² *Ibid.*, para 3 Harrison J for the Court.

²⁰³ *Ibid.*, paras 5-6 Harrison J for the Court. These were offences under the Arms Act 1983.

²⁰⁴ *Ibid.*, paras 8-9 Harrison J for the Court.

²⁰⁵ *Ibid.*, para 14 Harrison J for the Court.

criminal charges.²⁰⁶ The Court found that the CSO, as Mr Shapiro's employer, was "not 'connected with' the criminal proceedings against Mr Shapiro by virtue solely of its status as his employer":²⁰⁷

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

The Court found that the Full Court of the Court of Appeal in *Liddell* had extended the ambit of the protection under section 140 without "subjecting the statutory provision to analysis or identifying the jurisprudential basis" for its conclusion that the necessary connection was present in that case.²⁰⁸ The Court sought to distinguish *Liddell* as being "not of direct assistance here" and suggested that the Full Court had viewed the circumstances in that case as "exceptional".²⁰⁹ The Court then held:²¹⁰

We do not accept that a Court's jurisdiction under s 140...extends to prohibition of publication of the name of an entity which is not connected with the proceedings but only with the accused. That information is of a collateral nature and is unrelated to the criminal proceedings.

In reaching this decision, the Court of Appeal has effectively narrowed the availability of name suppression under section 140 to only persons strictly connected with the proceedings – third parties, such as family members of a defendant, are no longer able to obtain protection under section 140.²¹¹

²⁰⁶ Ibid, para 13 Harrison J for the Court.

²⁰⁷ Ibid, para 15 Harrison J for the Court, after having held that the Christchurch Symphony Orchestra – as an incorporated body – was a "person": Interpretation Act 1999, s 30.

²⁰⁸ Ibid, para 16 Harrison J for the Court.

²⁰⁹ Ibid, para 17 Harrison J for the Court.

²¹⁰ Ibid, para 19 Harrison J for the Court.

²¹¹ Interestingly the Court left open the question of whether such an order might be possible under the inherent jurisdiction of the court: *ibid*, para 21 Harrison J for the Court. See also Part III C A Door Left Ajar? The Inherent Jurisdiction of the Court.

D *Analysis and Call for Reconsideration*

There is now no law that allows third parties such as family members to protection in their own right if their only connection to proceedings is a connection to the accused.²¹² There a number of difficulties with this.

1 *Shapiro*

A couple of observations can be made about the analysis in *Shapiro*.

Firstly, the Court of Appeal held that the relationship in *Shapiro* did not have a sufficient enough connection to be within the ambit of a discretionary power “that has the effect of imposing a limitation on the *entrenched* right of freedom of speech: s 14 New Zealand Bill of Rights Act 1990”.²¹³ This statement overstates the status of the BORA and freedom of expression in New Zealand and may have potentially coloured the rest of the analysis of the Court. Neither the BORA nor section 14 is entrenched or conferred the status of supreme law. Moreover, all rights affirmed by the BORA – including freedom of expression – are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.²¹⁴ Consequently the finding that the phrase cannot include people connected with proceedings only by virtue of their relationship with a defendant *because* this is not a sufficient enough connection in order to limit the freedom of expression may be mistaken – especially without undertaking a full BORA analysis.²¹⁵ Arguably it would be a justified limitation on the freedom of expression to suppress the names of parties connected to proceedings in this way should the harm they may suffer be disproportionately severe, indeed this has been the case in other decisions already.²¹⁶ Furthermore, the availability of such an order to protect a third party from severe hardship rather than protecting these parties through an order

²¹² *Suppressing Names and Evidence*, above n 3, 38.

²¹³ *R v Shapiro*, above n 201, para 15 Harrison J for the Court (emphasis added).

²¹⁴ Bill of Rights Act 1990, s 5.

²¹⁵ Such an analysis can be seen *R v Hansen* [2007] 3 NZLR 1 (SC).

²¹⁶ *R v Liddell*, above n 24; and “*A Defendant*” v *Police*, above n 109.

suppressing the name of a defendant, would seemingly allow for the least possible infringement on the freedom of expression and open justice.

Secondly, the major criticism from the Court of Appeal of the cases that had favoured a wide interpretation of the phrase was that these decisions had not subjected this phrase to analysis or identified the jurisprudential basis for that interpretation.²¹⁷ However in making this finding, the Court of Appeal itself conducted only a limited statutory analysis of the phrase to establish its jurisdictional basis. While the Court could have thoroughly investigated the etymology of the phrase to help establish its meaning, it preferred to focus its analysis only on an impression that open justice and the freedom of expression required a more sufficient connection to the proceedings in order to be limited.²¹⁸ Moreover, the Court of Appeal did not discuss what *is* included within the ambit of the phrase – for example, victims²¹⁹ and witnesses.²²⁰ Even though the fact that a number of decisions – including a Full Court of the Court of Appeal – had interpreted section 140 to include people connected to proceedings by virtue of their close relationship to a defendant would seemingly be relevant to any discussion of the meaning of the phrase, these cases were distinguished as being of “[no] direct assistance”.²²¹

2 Policy

While there may be some issues with the analysis in *Shapiro* – and whatever the correct interpretation of the phrase is in section 140 – it would seem there are a number of policy arguments that would justify reconsideration of this issue.

Firstly, while all third parties connected to criminal proceedings may always be adversely affected, there will be some instances where publication of their identifying

²¹⁷ See, for example, *R v Shapiro*, above n 201, paras 16 and 18 Harrison J for the Court. But compare, *R v Liddell*, above n 24, 546 Cooke P for the Court: “We see no reason, however, why these innocent persons [the accused’s wife and sons], although they are “connected with the proceedings” as the Judge held, should not receive such protection as the statute enables.” Arguably *Liddell* did think such jurisdiction existed.

²¹⁸ *R v Shapiro*, above n 201, para 15 Harrison J for the Court.

²¹⁹ See, for example, *Re Victim X*, above n 44.

²²⁰ See, for example, *Taylor v Attorney-General*, above n 54; and *R v Burns (Travis)*, above n 26.

²²¹ *R v Shapiro*, above n 201, para 17 Harrison J for the Court.

particulars will cause them to be disproportionately affected. Arguably in these situations some protection ought to be available. Indeed the Law Commission has rightly highlighted that:²²²

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

Secondly, the Court of Appeal in *Shapiro* found that identifying particulars of third parties, such as Mr Shapiro's employer, connected to a defendant facing criminal proceedings is information "of a *collateral nature* and is *unrelated to the criminal proceedings*".²²³ If this is indeed the case, it is hard to identify whether there is genuine public interest in knowing the identifying details of these people. What does publication of this information add to the public interest, beyond mere public curiosity, in the criminal proceedings? While the public has freedom to seek and receive information "of *any kind* in any form",²²⁴ perhaps where their only interest in this 'unrelated' information is mere curiosity and the potential degree of hardship that may be suffered by these parties is significant and disproportionate, the suppression of such information would be a justified limitation on the freedom of expression.²²⁵ This provides further support for the availability of such an order.

Finally, the ability of the court to make an order, where appropriate, prohibiting publication of identifying details of a third party may assist and promote open justice and freedom of expression overall. This is because the availability of such a limited order, rather than one suppressing the identifying particulars of a defendant, can be the least possible infringement on open justice and freedom of expression. This is because arguably publication of identifying particulars of a defendant is principally the information that is more directly relevant to the criminal proceedings and the availability

²²² *Suppressing Names and Evidence*, above n 3, 38.

²²³ *R v Shapiro*, above n 201, para 19 Harrison J for the Court (emphasis added).

²²⁴ Bill of Rights Act 1990, s 14 (emphasis added).

²²⁵ Bill of Rights Act 1990, s 5.

of which is in the public interest. For example, the orders made in *Liddell* and *A Defendant* illustrate that a limited order can be made protecting the family of a defendant from severe hardship by suppressing their identifying details, thus abrogating the need to suppress the identifying particulars of the defendant in order to protect those parties, and thereby ensuring that details of the defendant are still published and open justice and freedom of expression are the least infringed.

3 *Evaluation and suggested provision*

If the judiciary does not reconsider the meaning of the phrase, Parliament could define “connected with proceedings” in the CJA, for example, to include persons connected to proceedings by virtue of a relationship of sufficient connection or alternatively a separate provision could be enacted – the following is suggested:

Section 140C Court may prohibit publication of identifying particulars of third parties

- (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 any offence, of the name, address or occupation of any third party connected with the proceedings, directly or by virtue of a relationship of sufficient connection with a party to the proceedings, or any particulars likely to lead to any such person’s identification, if that court is satisfied that publication would –
 - (a) for any reason not be in the interests of justice;
 - (b) endanger the safety of any person; or
 - (c) cause undue hardship to the third party.
- (2) In considering whether to make such an order, the court must recognise –
 - (a) that a primary objective in the administration of justice is to safeguard the public interest in open justice, the right to a fair and public hearing, and the consequential right of the news media to publish information relating to court proceedings; and
 - (b) the stage of the proceedings at which the application is made.
- (3) In considering whether to make such an order, the court shall consider –
 - (a) whether there is a real and substantial risk that the third party would suffer significant and disproportionate harm if their identity were disclosed;
 - (b) whether effective alternatives are available to protect the identity of the third party;
 - (c) the impact of the proposed order on the freedom of expression of those affected by it;
 - (d) whether the public interest requires that the identifying particulars of the third party not be suppressed;
 - (e) the salutary and deleterious effects of the proposed order; and
 - (f) any other factor that the judge or justice considers relevant at this stage of the proceedings.

- (4) The court may only make a suppression order if it is satisfied that in the circumstances there is a sufficient threat to the interests of justice, the safety of any person, or to the undue hardship to the third party, to justify the making of the order in the particular case.

E Conclusion

Whether the interpretation favoured in *Shapiro* is correct or not, it would seem there are many policy considerations that would suggest (and justify) that the court should have the ability to prohibit, where appropriate, publication of identifying particulars of third parties connected to proceedings by virtue of a relationship of sufficient connection with a party to the proceedings.²²⁶

VI VICTIMS AND WITNESSES – ARE WE BEING UNFAIR?

A Introduction

These provisions are a direct legislative recognition by our Parliament of the difficult, more usually appalling, position in which victims are routinely placed as a result of criminal acts.²²⁷

We cannot fail to have some sense of the anguish which this result, like similar decisions, causes for Mr X and his family. Our reading of all the material before the Court makes that worry very clear.²²⁸

Victims and witnesses come into contact with the criminal justice system for very different reasons to a defendant. Victims²²⁹ emerge because they have been victimised

²²⁶ While it is outside the scope of this paper, should neither Parliament nor the judiciary reconsider this issue, the author suggests that such an order might be possible under the inherent jurisdiction of the court. The Court left open this question: *R v Shapiro*, above n 201, para 21 Harrison J for the Court. See also, Part III C A Door Left Ajar? The Inherent Jurisdiction of the Court.

²²⁷ *Re Victim X*, above n 44, para 14 (HC) Hammond J. Hammond J discusses the provisions of the Criminal Justice Act 1985, particularly section 139, and the Victims of Offences Act 1987 (now Victims Rights Act 2002).

²²⁸ *Ibid*, para 58 (CA) Keith J for the Court.

²²⁹ The author notes that it may be more accurate to describe this party as a complainant, at least in the initial stages of a case. Labelling this party as a victim at all stages presupposes they are a victim *before* a

by a defendant. Witnesses appear sometimes at will, sometimes not,²³⁰ to assist the presentation of a case against a defendant to the court. Both are placed in these positions only in response to the actions of a defendant. This alone can be harrowing enough without the potential for these individuals to be subjected to intense media scrutiny. Victims may feel revictimised and witnesses may feel unfairly treated. Future victims and witnesses may be deterred or become reluctant to assist. In this context it seems unfair that the approach to name suppression for these individuals is the same as the approach to name suppression for defendants, whether accused or convicted. It is time the position of victims and witnesses is reconsidered.

B Current Framework

A number of statutory provisions restrict publication of the names of victims and witnesses in criminal proceedings.

In the CJA, name suppression may be available automatically or at the discretion of the court.²³¹ There are also other specific statutory provisions.²³² In relation to witnesses generally, the Evidence Act 2006 provides pre-trial and trial anonymity orders may be made in certain instances.²³³

C Assessing the Current Approach

The Court of Appeal has held that the threshold for victim and witness name suppression under section 140 is no different to the approach to defendants. The starting

defendant has been convicted. However, in the interests of brevity, the author uses the term 'victim' throughout this portion of the paper to encompass both *actual* victims and complainants (unless the context makes otherwise clear). See also Part IV E Victim or Complainant?

²³⁰ For example a witness may be subpoenaed in criminal proceedings: see Crimes Act 1961, s 351 and Summary Proceedings Act 1957, ss 20 and 38.

²³¹ See Part III Current Legal Framework.

²³² See, for example, Evidence Act 2006, ss 108 and 109 which operate to protect the identity of witnesses who are undercover police officers. See also New Zealand Security Intelligence Service Act 1969, s 13A which operates to protect members of the Security Intelligence Service.

²³³ Evidence Act 2006, ss 110 and 112.

point is the principle of open justice.²³⁴ This presumption must be clearly outweighed²³⁵ by “compelling reasons” or “very special circumstances” to justify departure from open justice.²³⁶

1 *The authority*

Re Victim X sets the threshold for victim and witness name suppression.

X was a victim of an intended kidnapping plot. Three men were arrested on charges of attempted kidnapping. At the time of the attempted kidnapping, X was aged 45 and living in Wellington as the executive chairman of a major New Zealand investment bank. He was married with three children, all from previous relationships. The two eldest (aged 15 and 17) lived in Auckland with their mother and a seven-year-old daughter lived in Wellington in an equal shared custody arrangement between X and her mother. X's current wife was also in an advanced pregnancy.

(a) *Re X*

In *Re X*, Hammond J dealt with an application to set aside an earlier order he had granted under urgent application suppressing the name of X.²³⁷ He acknowledged that “...the possibility of harm to a victim is explicitly recognised by our law, and must receive distinct consideration as to whether it displaces the general principle of open justice...”²³⁸ In addressing this, Hammond J identified the right of X (and his family) as victims to privacy and noted neither X nor his family had at any time courted publicity.²³⁹ Hammond J held that the stress publication would cause X and his family was significant

²³⁴ *R v Liddell*, above n 24, 546-7 Cooke P for the Court.

²³⁵ *Lewis v Wilson & Horton Ltd*, above n 22, para 43 Elias CJ for the Court.

²³⁶ *Re Victim X*, above n 44, para 37 (CA) Keith J for the Court.

²³⁷ *Re X* [2002] NZAR 938 (HC).

²³⁸ *Ibid*, para 13 Hammond J.

²³⁹ *Ibid*, para 15 Hammond J.

and placed particular importance on potentially for adverse health affects to be suffered by X's pregnant wife.²⁴⁰ At this stage it was unlikely X would have to give evidence.²⁴¹

Hammond J held these factors dictated that it was an "unremarkable case for suppression" but for the one feature that the information had already been published on a United Kingdom website.²⁴² Notwithstanding this, which Hammond J felt should not deflect the ability of the court to "afford such protection from harm to the victim as it can employ", he refused to set aside his earlier order and name suppression was maintained.²⁴³

[T]he general public interest in open justice is *well out-weighed* in this case by the harm – *both actual and potential* – which would be suffered by X and his family by publication of his name and particulars; and the resultant *intrusion upon his and their privacy*. And in the events which have happened, that *harm would not diminish but enlarge on publication* due to the likely increased media attention.

(b) *Re Victim X*

In *Re Victim X* Hammond J reviewed the suppression order on his own motion because circumstances had changed.²⁴⁴ This included that X's wife had safely given birth and the enactment of the Victims' Rights Act 2002 ("VRA").²⁴⁵ However, particular emphasis was placed on the fact that X would now be giving evidence.²⁴⁶

In light of these changes, the suppression order was lifted. The decision was appealed unsuccessfully.²⁴⁷

²⁴⁰ *Re Victim X*, above n 44, para 11 (HC) Hammond J.

²⁴¹ *Ibid*, para 5 (HC) Hammond J.

²⁴² *Re X*, above n 237, para 20 Hammond J.

²⁴³ *Ibid*, para 19 Hammond J (emphasis added).

²⁴⁴ *Re Victim X*, above n 44, para 8 (HC) Hammond J.

²⁴⁵ *Ibid*, para 8 (CA) Keith J for the Court.

²⁴⁶ *Ibid*, para 8 (HC) Hammond J.

²⁴⁷ *Ibid*, para 55 (HC) Hammond J: where Hammond J left open the question as to whether a party could appeal his order made in the course of the trial. See also *ibid*, paras 13, 30 and 58 (CA) Keith J for the Court. An appeal was made but dismissed for want of jurisdiction. However, in its analysis the Court of Appeal affirmed Hammond J's approach. The author notes that strictly this affirmation is obiter only.

2 *Difficulties with Re Victim X*

(a) Changed circumstances

Hammond J found that *Re X* was an “unremarkable case for suppression”. However, in *Re Victim X* Hammond J lifted the suppression order because circumstances had changed. The two changes principally relied upon were the successful child birth and that X would now be a witness in the trial. While these are significant changes, it is unclear whether they are of a sufficient magnitude to overturn Hammond J’s original view that open justice was “well out-weighed” by the actual and potential harm which would be suffered by X and his family. This question cannot be answered determinatively as Hammond J did not discuss in-depth whether the other factors he found in *Re X*, which contributed to open justice being “well out-weighed”, were still operating.

Furthermore, the most emphasised change was that X would now be a witness.²⁴⁸ Hammond J held, in the context of this development, that the approach to name suppression for victims is the same as the approach to name suppression for defendants. This means that the precedent for the approach to victim name suppression was coloured by the fact that the victim was also a witness. It is unclear what Hammond J’s approach would have been if circumstances had changed but X had not become a witness, or in other words, if X was a victim only.²⁴⁹

²⁴⁸ The author notes that interestingly it seems that X only ended up in the witness box for a very short period of time to assist with a couple of minor points. He also had to face cross examination by one of his alleged kidnapers who represented himself. See Naming Mr X creates stir www.tvnz.co.nz (last accessed 10 August 2009); and Alleged kidnap plot baffles Trotter www.tvnz.co.nz (last accessed 10 August 2009).

²⁴⁹ See Part VI E Victim or Complainant? The author notes that this finding may mean a witness has comparatively less cause than a victim to justify name suppression.

(b) VRA treatment

Re Victim X held that the VRA had not affected the approach to name suppression for victims.²⁵⁰

The purpose of the VRA is to “improve provisions for the treatment and rights of victims of offences”.²⁵¹ The Act makes it clear that the judiciary should treat victims with courtesy, compassion and respect for their personal dignity and privacy.²⁵² However this does not confer any enforceable legal right.²⁵³ In *R v Koloï* Judge Roderick Joyce QC held that the VRA:²⁵⁴

neither expresses nor implies any intent on the part of Parliament to displace the principle of open justice – a conclusion supported by the fact that Parliament did address the matter of suppression of certain victims in some ways but, as the Court of Appeal noted [in *Re Victim X*], in the direction as it happens of openness if they consent.

While this may be the correct interpretation of the influence of the VRA on the paramountcy of open justice in name suppression, it does not deflect from the fact that Parliament introduced the VRA to indicate that victims are different and require special attention. This would seemingly suggest that victims should be treated differently to defendants and an approach favoured that improves the treatment and rights of victims, showing courtesy, compassion and respect for their personal dignity and privacy. Arguably *Re Victim X* did not consider this point in depth.

²⁵⁰ *Re Victim X*, above n 44, para 33 (HC) Hammond J and para 53 (CA) Keith J for the Court.

²⁵¹ Victims' Rights Act 2002, s 3.

²⁵² Victims' Rights Act 2002, s 7. See also, *Television New Zealand Ltd v R* [1996] 3 NZLR 393, 395 (CA) Keith J for the Court.

²⁵³ Victims' Rights Act 2002, s 10.

²⁵⁴ *R v Koloï* [2004] DCR 128, para 28 (DC) Judge Roderick Joyce QC.

(c) Public interest and justice without a name

(i) Can justice be done without a name?

In *Re Victim X* the Crown argued they did not think there was more to be gained from publication of the victim's name.²⁵⁵ Hammond J found this unpersuasive and held that the name of the victim would have to be known for people to come forward²⁵⁶ and to know "how the case was dealt with".²⁵⁷ This raises the question of whether justice can still be done without publicising the name of the victim or witness.

If the name of a victim or witness is suppressed it is unlikely the due process rights of an accused will be affected.²⁵⁸ Justice can still be done. The media and public can still be in court. Witnesses and victims can be seen and heard by those present. The trial can still be covered. Only publication of material leading to their identification is precluded²⁵⁹ and the conduct of the trial, and success or otherwise of the defendant, "does not turn on this kind of thing".²⁶⁰ Moreover, very often the public has no concern with the name of a victim or witness except for "a somewhat morbid curiosity".²⁶¹

(ii) Legitimate public interest or mere curiosity?

A primary justification for Hammond J lifting the suppression order in *Re Victim X* was his finding that "the public is entitled to know and form its own views on what happened".²⁶² However, it is often hard to find legitimate public interest beyond mere curiosity in the widespread publication of identifying particulars of a victim or witness.²⁶³

²⁵⁵ *Re Victim X*, above n 44, para 40 (HC) Hammond J.

²⁵⁶ The author notes however that Hammond J did not discuss whether a description that did not identify the victim could still achieve the same purpose.

²⁵⁷ *Re Victim X*, above n 44, para 38 (HC) Hammond J.

²⁵⁸ *Delivering Justice for All*, above n 4, 318.

²⁵⁹ *Taylor v Attorney-General*, above n 54, 680 Wild CJ.

²⁶⁰ *R v Socialist Worker Printers and Publishers Ltd, ex parte Attorney-General* [1975] 1 All ER 142, 150 (QB) Lord Widgery CJ.

²⁶¹ *Ibid.*

²⁶² *Re Victim X*, above n 44, para 38 (HC) Hammond J.

²⁶³ *Suppressing Names and Evidence*, above n 3, 34.

– “no doubt the incident is newsworthy and the trial is newsworthy, but what is the public interest in the identity of the victim or the victim’s family?”²⁶⁴

Knowing their identity will often not “add substantively to information about the crime in question.”²⁶⁵ It may be that Hammond J equated public interest with the fact that the public *were* interested.²⁶⁶ This is further emphasised by the fact that neither X nor his family had courted publicity and may therefore especially be entitled to have their privacy respected.²⁶⁷ While the distinction between genuine public interest and mere curiosity has been recognised in privacy²⁶⁸ and family law,²⁶⁹ this discussion, and whether it influences the balancing assessment of the factors for and against suppression, did not occur in *Re Victim X*.

3 *Advantages of current approach*

The current approach does have advantages. Firstly, it accords well with the notion that everything ought to be on public record in criminal proceedings.²⁷⁰ Open justice is paramount and there ought to be a very high threshold before names of victims and witnesses are suppressed. It also reinforces that openness requires participants in the criminal justice process to be more careful about what they say.²⁷¹ The quality of the

²⁶⁴ Paul Marcus “The Media in the Courtroom: Attending, Reporting, Televising Criminal Cases” (1982) 57 Indiana LJ 235, 270. See also, Butler and Butler, above n 57, 338: “[T]he integrity of the justice system and the right to freedom of expression do not require the reporting of the full personal details of parties involved in Court proceedings (this includes the names of the accused in criminal trials) since the wellbeing of the parties and their families is of paramount importance.”

²⁶⁵ *R v W (No 3)* (2 December 2004) HC NEL CRI-2004-042-001663, para 3 (HC) Goddard J.

²⁶⁶ Fiona Jackson, above n 92, 24.

²⁶⁷ Eric Barendt, above n 9, 315, where the author notes, in relation to victims, that “usually...the protection of privacy is thought more important in this context than the right of the press and other media to identify the complainant or the interest of the public in receiving that information.” See also, *R v W (No 2)*, above n 35, para 17 Goddard J.

²⁶⁸ *R v W (No 2)*, above n 35, para 27 Goddard J. See also, *Hosking v Runting*, above n 33.

²⁶⁹ *Newspaper Publishers Association of New Zealand (Inc) v Family Court*, above n 170, 352 Pankhurst and Chisholm JJ: “A distinction needs to be drawn between cases of mere curiosity and cases where the press seeks to publish information or comment about a matter of genuine public interest.” See also, in a non-family law context, *R v H*, above n 171, 489 Baragwanath J: “In my judgment there is no relevant public interest or need to know that this man has been charged...”

²⁷⁰ *Delivering Justice for All*, above n 4, 318.

²⁷¹ *R v Socialist Worker Printers and Publishers Ltd, ex parte Attorney-General*, above n 260, 150 Lord Widgery CJ.

justice system is enhanced if participants know what they say, and who they are, is public information. This helps maintain public confidence in the fairness and impartiality of criminal proceedings.²⁷² More practically, suppressing identity can sometimes make it difficult to publish evidence during a trial, which further restricts open justice.²⁷³

However these advantages seem to merely reinforce the paramountcy and importance of open justice. They do not suggest the current approach to name suppression for victims and witnesses is the most suitable for the needs of these individuals, nor are they inconsistent with the possibility that a different approach should be adopted. Indeed a suitable approach could still achieve these advantages and not impinge the goals of openness.²⁷⁴

While it would seem that, reservations aside, *Re Victim X* is clear about the approach to victim and witness name suppression, there are many reasons to reconsider the approach.

D *Reasons for New Approach*

I Differences

There is little justification for treating witnesses, victims and defendants alike for the purposes of name suppression; witnesses are invariably there because of their public duty, while for victims it often means reliving a painful experience.²⁷⁵

The current approach does not recognise that victims and witnesses are different from defendants. Publicity can unfairly impact witnesses and revictimise victims causing shame and humiliation, possible risks to safety, and adversely affect families and businesses.²⁷⁶ While the punitive function of publicity may be congruent with a high threshold for defendant name suppression, it seems unfair that victims and witnesses

²⁷² *Suppressing Names and Evidence*, above n 3, 36.

²⁷³ *Ibid*, 34.

²⁷⁴ *Delivering Justice for All*, above n 4, 318.

²⁷⁵ *Ibid*.

²⁷⁶ *Suppressing Names and Evidence*, above n 3, 34.

should be held to this same standard and their privacy infringed through potentially intense media publicity.²⁷⁷ It would seemingly be a justifiable limitation on freedom of expression for victims and witnesses to be treated differently. Indeed that is the case in other CJA provisions.²⁷⁸

Furthermore, Parliament has particularly recognised the unique position of victims in the VRA.²⁷⁹ The VRA aims to “improve provisions for the treatment and rights of victims of offences”²⁸⁰ and provides that respect for their privacy is one of the rights of a victim.²⁸¹ It would seem inconsistent with the policy of this Act for the approach to name suppression for victims to be the same as the approach to those who perpetrated their victimisation.

2 *Justifications*

The justifications underlying open justice and the high threshold for defendant name suppression do not apply with the same force to victims and witnesses. This is because name suppression for victims and witnesses does not raise the same issues that arise in relation to name suppression for defendants.²⁸² Typically these are concerns such as the possibility of suspicion unfairly falling on others, the public interest in knowing the true character of the person seeking suppression, issues of public safety and the possibility of discovering further offending or victims and witnesses.²⁸³ While these may be genuine considerations pointing towards open justice and a high threshold for defendant name suppression, they do not apply at all, or at least not with the same

²⁷⁷ Fiona Jackson, above n 92, 21.

²⁷⁸ For example, the special position of victims who give evidence in criminal cases is partially recognised in the Criminal Justice Act 1985, s 139 which provides for name suppression of victims of certain sexual offences. See also, Criminal Justice Act 1985, s 139(1AA) which was added to reinforce the protective nature of the section.

²⁷⁹ Burrows and Cheer, above n 10, 338.

²⁸⁰ Victims' Rights Act 2002, s 3.

²⁸¹ Victims' Rights Act 2002, s 7. See also, Burrows and Cheer, above n 10, 338.

²⁸² *Suppressing Names and Evidence*, above n 3, 33.

²⁸³ *Suppression and Contempt*, above n 37, 16-17.

force,²⁸⁴ to victims and witnesses. This would suggest that holding victims and witnesses to the same threshold as defendants is inappropriate.

The difficulty with the current approach is that it has a defendant in mind when it focuses on the requirement for “compelling reasons” to be shown to displace the presumption of open justice – it does not investigate whether there are any reasons to *justify* publication of the name of a victim or witness.²⁸⁵

3 *Encouraging victims and witnesses*

It is important to encourage victims and witnesses to participate in court proceedings. The comfort of knowing that particulars of their identity would not be published if there were reasonable grounds for such a request would indicate that the law recognised the value of their participation and had some flexibility with respect to their personal wishes as to name suppression.²⁸⁶

Victims and witnesses play an important role in the criminal justice system. However this role is difficult to perform. They face enough difficulties having to cope with the rigours of a trial, let alone the potential to feel revictimised and face intense public scrutiny. It is important to encourage and support not only those that are participants in the system already, but also those that may participate in the future.

Victims and witnesses may be deterred from coming forward because of fears of name publication.²⁸⁷ For example, victims of domestic violence may feel shame and

²⁸⁴ See, for example, *Re Victim X*, above n 44, para 40 (HC) Hammond J, where it is suggested that publication of the name of Victim X may bring others forward. However the author notes that Hammond J did not address whether a description that does not identify Victim X could still achieve the same purpose.

²⁸⁵ Fiona Jackson, above n 92, 26. See also, *R v Geoffrey David Davis* [1995] FCA 1321, para 6 Wilcox, Burchett and Hill JJ: “There being no special circumstances requiring a departure from the general rule, there was no justification for permitting publication of the complainants’ names in this case.” It is also noted that victims are generally to be treated differently to defendants.

²⁸⁶ *Delivering Justice for All*, above n 4, 319.

²⁸⁷ See, for example, Eric Barendt, above n 9, 351: “[A] report by a popular newspaper or on television will have enormous impact on the privacy of the victim, and may well deter other women from reporting rape to the police... There are in fact sometimes stronger arguments for restrictions on media reporting than there are for limits on access to the trial itself, even though these restrictions clearly engage the free speech rights of the press to report legal proceedings.”

humiliation which may be exacerbated by name publication.²⁸⁸ They may be dissuaded if name suppression is difficult to obtain. Similarly, in *R v Paterson* Penlington J recognised that the potential for a witness to be victimised, before or after giving evidence, is an interference with the due administration of justice because it can “deter other people from coming forward and giving evidence frankly and fully and without fear of the consequences”.²⁸⁹ Too high a threshold for name suppression can inhibit the ability of the court to provide victims and witnesses with adequate protection which may deter others from coming forward in fear of publication consequences.

E Victim or Complainant?

The author acknowledges that it may be imbalanced to label a complainant that appears before the court a victim at all stages of proceedings.²⁹⁰

The author also notes that arguably case law may suggest that comparatively a witness may have less cause than a complainant or victim to justify name suppression.²⁹¹ Because witnesses appear to assist in the presentation of a case against a defendant to the court, it may be that in order for this case to be tested and a fair trial conducted, a witness should more readily be exposed to the full rigours of open justice.²⁹² A natural corollary may be that when a victim is also a witness they too may have less cause, than if they were a victim or complainant alone, to justify name suppression.²⁹³

²⁸⁸ *Suppressing Names and Evidence*, above n 3, 34.

²⁸⁹ *R v Paterson* [1992] 1 NZLR 45, 50 (HC) Penlington J. See also, *Attorney-General v Butterworth* [1962] 3 All ER 326, 329 (CA) Lord Denning MR.

²⁹⁰ See Part VI A Introduction.

²⁹¹ See *Re Victim X*, above n 44.

²⁹² In other words, to ensure that the defendant enjoys the full benefit of their right to a fair trial there may be more cause to suggest the name of the witness should not be suppressed from publication. It may be that psychologically cross-examination and other processes will be more fair (or effective) if the witness knows that their name may be published in a report of the proceedings. A counterargument to this could reiterate the *actual* effect of name suppression – see Parts VI C 2 (c) Public interest and justice without a name; and IV F 2 A note on names: only publication is restricted and as the court is still open, arguably a witness can still be ‘checked’ (and the trial still be fair and open) by the presence of the public in the court room.

²⁹³ See *Re Victim X*, above n 44; and Part VI C (a) Changed circumstances. Arguably the decision in *Re Victim X* may be able to be justified on this basis.

While it may be that until conviction a complainant should have no greater justification for name suppression than any witness (but that after conviction a victim should be accorded more protection), the author prefers a dynamic approach that makes an overall assessment at the time the application is made, as to whether suppression is justified in the circumstances. It may be that a different approach would discourage others from coming forward.²⁹⁴

F Possible Approaches

The reluctance of the judiciary to modify the approach for victims and witnesses²⁹⁵ leaves the ball in Parliament's court – a clear, transparent response is required. There are many possible approaches.

1 Law Commission

The Law Commission has examined this issue a number of times.²⁹⁶ While the terms of its recommendations may have varied, its recognition of the different considerations applicable to victims and witnesses has not changed.

(a) Delivering justice report

In 2004 the Commission recommended that “where a request for name suppression of a victim in criminal proceedings is made, that request should be granted unless it would not be in the interests of justice to do so.”²⁹⁷ It recommended the status quo be maintained for witnesses.²⁹⁸

²⁹⁴ It is outside the scope of this paper to consider whether or not complainants, especially considering they are facing the rigours of an open trial (even if publication of their name is restricted), are in most instances telling the truth.

²⁹⁵ See, for example, *Re Victim X*, above n 44, (HC) para 42 Hammond J: “...one would have thought that a parliamentary mandate for widespread change was required.”

²⁹⁶ See, for example, *Delivering Justice for All*, above n 4; and *Suppressing Names and Evidence*, above n 3.

²⁹⁷ *Delivering Justice for All*, above n 4, 319.

²⁹⁸ *Ibid.*

(b) Suppression issues paper

In 2008 the Commission suggested that the approach to name suppression for victims and witnesses ought to be different to the approach to name suppression for defendants – open justice as the starting point but three grounds to justify suppression, where publication: endangers safety; would cause undue hardship to a victim or witness; or for any other reason would not be in the interests of justice.²⁹⁹

2 *Canada*

Canada affords an example of a jurisdiction that specifically provides for victims and witnesses.³⁰⁰ The provision is clear and thorough, assisting the court in the exercise of its discretion by not only detailing the importance of open justice but also recognising the special considerations that apply to victims and witnesses.³⁰¹

3 *Evaluation and suggested provision*

It is clear the Law Commission recognises the different considerations applying to victims and witnesses would seem to demand and justify a different approach being adopted.³⁰² Of its suggestions, the 2008 proposal should be preferred. This is because while it recognises the different position of victims and witnesses, it also acknowledges the importance of open justice.

²⁹⁹ *Suppressing Names and Evidence*, above n 3, 35-36.

³⁰⁰ Canadian Criminal Code RS C 2009 c C-34, s 486.5. See Part X B Appendix Canadian Criminal Code, s 486.5. This provision is particularly interesting given the great significance Canada places on the freedom of expression and its high threshold for suppression (or ‘common law publication bans’) in other instances: see *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835 (SCC) and *R v Mentuck* [2001] 3 SCR 442 (SCC).

³⁰¹ Canadian Criminal Code RS C 2009 c C-34, s 486.5(7). For example, whether there is a real and substantial risk that the victim or witness would suffer significant harm; whether the victim or witness needs the order to protect them from intimidation or retaliation; and society’s interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process.

³⁰² Perhaps especially recognising the need for a different approach for victims.

However, it is suggested that the Canadian approach may be more meritorious and should provide the direction for reform.³⁰³ This approach provides greater transparency and guidance in the exercise of the judicial discretion.

The author suggests the following provision:

Section 140D Court may prohibit publication of identifying particulars of complainants, victims and witnesses

- (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 any offence, of the name, address or occupation of any complainant, victim or witness connected with the proceedings, or any particulars likely to lead to any such person's identification, if that court is satisfied that publication would –
 - (a) for any reason not be in the interests of justice;
 - (b) endanger the safety of any person; or
 - (c) cause undue hardship to the complainant, victim or witness.

- (2) In considering whether to make such an order, the court must recognise –
 - (a) that a primary objective in the administration of justice is to safeguard the public interest in open justice, and the consequential right of the news media to publish information relating to court proceedings;
 - (b) the distinct place of complainants, victims and witnesses in the criminal justice process and the need to respect this position;
 - (c) the right of a defendant to a fair and public hearing; and
 - (d) the stage of the proceedings at which the application is made.

- (3) In considering whether to make such an order, the court shall consider –
 - (a) whether there is a real and substantial risk that the complainant, victim or witness would suffer significant and disproportionate harm if their identity were disclosed;
 - (b) whether the complainant, victim or witness needs the order for their security or to protect them from intimidation or retaliation;
 - (c) society's interest in encouraging the reporting of offences and the participation of complainants, victims and witnesses in the criminal justice process;
 - (d) the Victims' Rights Act 2002;
 - (e) whether effective alternatives are available to protect the identity of the complainant, victim or witness;
 - (f) the impact of the proposed order on the freedom of expression of those affected by it;
 - (g) whether the public interest requires that the identifying particulars of the complainant, victim or witness not be suppressed;
 - (h) the salutary and deleterious effects of the proposed order; and
 - (i) any other factor that the judge or justice considers relevant at this stage of the proceedings.

³⁰³ Indeed, some of the considerations detailed would seem to be consistent with principles that can be distilled from case law in New Zealand. Compare, *R v Koloï*, above n 254, para 32 Judge Roderick Joyce QC and the suggestion that suppression may be warranted where victims or their families might be in physical jeopardy if the victim's identity was in the public arena, with Canadian Criminal Code RS C 2009 c C-34, s 486.5(7)(c) where a factor to be considered is whether a victim or witness needs suppression to protect them from intimidation or retaliation.

- (4) The court may only make a suppression order if it is satisfied that in the circumstances there is a sufficient threat to the interests of justice, the safety of any person, or to the undue hardship to the complainant, victim or witness, to justify the making of the order in the particular case.

G Conclusion

There are many reasons to reconsider the approach to victim and witness name suppression. These individuals are different to defendants and the justifications substantiating the current approach are focussed on offenders rather than victims and witnesses. If victims and witnesses are to be encouraged to assist in the administration of justice they need to feel their dignity and privacy is respected and can be protected. The current threshold simply does not meet their needs.³⁰⁴ A new, more transparent approach should be adopted; victims and witnesses deserve greater protection and respect.

VII PENALTIES

A Current Framework

Breach of a suppression order granted under section 140 of the CJA is a strict liability offence. The offence will be proved unless the defendant can show, on the balance of probabilities, they have acted honestly and with all care that a reasonable person would take in the circumstances.³⁰⁵ In other words, a defence of honest and reasonable mistake or total absence of fault is available.³⁰⁶

A person who breaches a suppression order under section 140 is liable on summary conviction for a fine not exceeding \$1,000.³⁰⁷

³⁰⁴ Fiona Jackson, above n 92, 33.

³⁰⁵ *Karam v Solicitor-General* (20 August 1999) HC AKL AP 50/98, 8 (HC) Gendall J.

³⁰⁶ *Police v News Media Auckland Ltd* [1998] DCR 134, 139 (DC) Judge Nicholson QC.

³⁰⁷ Criminal Justice Act 1985, s 140(5). The penalties do vary slightly between the sections – a person who breaches, evades or attempts to evade an order made: under ss 138 (2)(a) or (b), 140, or 139(1) or (2) is liable on summary conviction for a fine not exceeding \$1,000; under s 138(2)(c) may be dealt with as a contempt of court; and under s 139A(1), in the case of a body corporate, is liable for a fine not exceeding

B Contempt

The law of contempt is concerned with preserving an impartial and effective justice system, and assessing the risk of interference with the administration of justice.³⁰⁸ Generally it is aimed at responding to actions or statements that: “directly threaten the court or disobey its orders; compromise a fair trial; undermine the authority and integrity of the court; and/or attempt to dissuade people from recourse to the court”.³⁰⁹ Particular breaches of suppression orders granted under section 140 may fit within any or all of these categories.

While the CJA provides that a breach, evasion or attempted evasion of particular orders may be dealt with as a contempt of court,³¹⁰ no such power is provided in section 140, where punishment is only by fine. Notwithstanding this, it has been suggested that a deliberate breach may be treated as common law contempt, in addition to the statutory fine.³¹¹ Moreover, section 401 of the Crimes Act 1961 and section 206 of the Summary Proceedings Act 1957 both provide the court with the power to order that any person who wilfully, and without lawful excuse, disobeys any order of the court in the course of the hearing of any proceedings, be taken into custody and detained “until the rising of the court”, and committed to prison for up to three months, or fined for up to \$1000 for each offence.³¹² A flagrant and intentional breach of an order under section 140 may therefore give rise to statutory contempt under these provisions.³¹³

\$5,000 and in the case of an individual, for a fine of up to \$1,000 or a term of imprisonment not exceeding three months.

³⁰⁸ *Suppressing Names and Evidence*, above n 3, 70.

³⁰⁹ *Suppression and Contempt*, above n 37, 22.

³¹⁰ Criminal Justice Act 1985, s 138(8). The author notes that the penalties under section 139A seem to be analogous to contempt too (albeit there is no specific mention of the word).

³¹¹ *Burrows and Cheer*, above n 10, 350.

³¹² Crimes Act 1961, s 401(1)(c); and Summary Proceedings Act 1954, s206(c): This may have only limited use as the provisions only apply to disobedience *during* the course of a proceeding.

³¹³ See also *Suppression and Contempt*, above n 37, 24 where it is noted that *Berryman v Solicitor-General* [2005] 3 NZLR 121, paras 43-44 (HC) Wild J appears to indicate that if a suppression order has already been defeated by others – ie, if the information is already in the public domain – contempt is unlikely.

C Adequacy and the Need for a Strong Deterrent

In assessing the adequacy of a penalty it is important to consider the interests at stake.³¹⁴ Suppression orders are court orders which provide protection to the administration of justice and reduce the harm endured by victims, witnesses and defendants when justice so requires.³¹⁵ These are extremely important functions and sometimes victims, witnesses and defendants – and the administration of justice – only have one opportunity for protection.³¹⁶

While it is important to acknowledge the general (and admirable) adherence to name suppression orders by professional media organisations in New Zealand,³¹⁷ the question of whether the current penalty regime provides an adequate deterrent to large media organisations faced with the temptation to publish suppressed details still remains – indeed the penalty has been described as “underwhelming”³¹⁸ and the High Court has urged Parliament to consider substantially increasing the fine so that prosecution is a “meaningful deterrent”.³¹⁹

The need for a meaningful deterrent is not limited to just the professional media. It must be remembered that media organisations are not the only people that can be present in court or come into contact with suppressed information and potentially breach name suppression orders. In our modern society, where technology is rife and our ability to effortlessly impart and receive information from multiple sources increases, so to does the prospect of the general public breaching name suppression orders. The advent and burgeoning practice of user-generated content such as blogging on the internet provides further need for a clear and more meaningful deterrent to be adopted. As many varied

³¹⁴ Eric Barendt, above n 9, 325 where the author notes that while a serious penalty such as contempt may infringe the right to freedom of speech and of the press, “it has much less serious consequences than those which might flow from denial of the right to a fair trial.”

³¹⁵ *Police v News Media Auckland Ltd*, above n 306, 141 Judge Nicholson QC.

³¹⁶ For example, fair trial rights of an accused: once the information is out, it is out and very difficult – if not impossible – to restore.

³¹⁷ Suppression and Contempt, above n 37, 21.

³¹⁸ *Ibid*, 20.

³¹⁹ *Solicitor-General v Fairfax New Zealand Ltd & Another* (10 October 2008) HC WGN CIV 2008-485-000705, para 138 (HC) Randerson and Gendall JJ.

groups of people may come into contact with suppressed information, it is especially important that provisions addressing penalties for transgression are specific and transparent so that all individuals can understand the consequences of disobedience.

D Possible Form of a Strong Deterrent

The current offence regime for breaches, evasion or attempted evasion of name suppression orders under section 140 ought to be reformed.³²⁰ The current penalty of \$1,000 is not a meaningful deterrent. Indeed this penalty is seemingly inconsistent with similar provisions in other legislation containing much higher penalties.³²¹ Moreover, the lack of clarity around the position and availability of common law or statutory contempt is undesirable. The public and media need more certainty of the possible contempt actions arising from breach of name suppression orders.

Reform in this area should be focussed on two needs: the need for meaningful penalties that recognise the significant interests that are protected by these orders; and the need for the consequences of offending to be specifically and transparently stated. Reform could be in the form of increased financial penalties and possible terms of imprisonment, a move away from strict liability towards a scale of tiered offences or a focus on knowledge and recklessness, higher penalties for corporate bodies, or a mixture of any of these.³²²

1 Knowledge and recklessness or tiered offences

The punishment for disobeying a name suppression order could be dependent on the knowledge or recklessness of a person as to whether or not an order was breached. If

³²⁰ The author notes that should the penalties in section 140 be altered, sections 138-139A of the Criminal Justice Act 1985 ought to be similarly reformed (and perhaps similar provisions outside the Act too). A consistent message must be sent to those who come into contact with suppressed information as to the consequences of disobeying these court orders.

³²¹ See, for example, Lawyers and Conveyancers Act 2006, ss 240 and 263 and the Health Practitioners Competence Assurance Act 2003, s 95 where the penalty for publication of a suppressed name is a fine of an amount not exceeding \$25,000 and \$10,000 respectively.

³²² *Suppressing Names and Evidence*, above n 3, 72-75

an individual knowingly breaches a suppression order this could give rise to a harsher penalty or a contempt of court. A person could be liable for reckless disobedience if he or she appreciated that there was a substantial risk of a suppression order being in place and, having regard to all the circumstances known, it was unjustifiable to take that risk.³²³ This categorisation may better reflect the care that people must take in relation to court suppressed information.

Another alternative may be the adoption of a tiered penalty provision that punishes both intentional and unintentional breaches. It has been suggested that this approach more adequately reflects possible levels of culpability.³²⁴ For example, in a digital age, an individual may intentionally breach a suppression order by publishing the name of a suppressed party on their internet blog, or may unintentionally breach a suppression order by copying this information from another website and publishing it again. The level of culpability in these two situations is different and arguably the punishment should reflect this difference. A similar approach has been adopted in relation to anonymity orders in the Evidence Act 2006.³²⁵

Regardless of form, there should be a distinction between the penalties for a body corporate and an individual. This distinction is common in other penalty provisions – for example, it appears again in relation to anonymity orders in the Evidence Act 2006 (within the tiered offence structure).³²⁶ This division is necessary to acknowledge that, while both must be deterred, a body corporate has greater access to resources to ensure suppressed information is handled responsibly. Moreover, practically body corporate publishers may have greater publicity impact and reach than individual publishers.

³²³ Ibid, 72.

³²⁴ Ibid.

³²⁵ Evidence Act 2006, s 119.

³²⁶ Ibid.

The ability of media organisations to obtain accurate and timely information in relation to the terms, duration and scope of name suppression orders is crucial for the reporting aspect of open justice. The media frequently complain that access to this information varies between registries and is difficult to obtain.³²⁷ There is a significant need for the reasons and terms of each name suppression order to be stated clearly and for an accessible record of the details of these orders to be kept. This will ensure that journalists – whether or not they are in court at the time an order is issued – are able to fully understand and check the terms of orders in force. Moreover, this becomes all the more necessary if the penalties incurred for breaching suppression orders increase – parties must easily be able to determine what information is suppressed.

(a) Terms and reasons

There is currently no statutory requirement to give reasons for a suppression order.³²⁸ However it has been considered desirable to do so and in most instances a failure to provide reasons will amount to an error of law.³²⁹ Despite this, reasons are sometimes still not provided.³³⁰

The author is of the opinion that there should be a statutory requirement to provide reasons for, and clearly state the terms of, any suppression order granted. Reasons must be provided as they assist the public in their understanding of why a suppression order has been considered appropriate.³³¹ The terms must be stated so the restrictions on the ability of the media and public to use this information can be easily determined. Moreover, a requirement to provide reasons and state the terms of an order would: act as a discipline for judges to ensure they consistently consider all relevant

³²⁷ See, for example, Television New Zealand (News & Current Affairs) *Submission on Suppressing Names and Evidence* (submission to the New Zealand Law Commission, 2009) 12; and Fairfax Media *Submission on Suppressing Names and Evidence* (submission to the New Zealand Law Commission, 2009) 14.

³²⁸ *Suppressing Names and Evidence*, above n 3, 49.

³²⁹ *Lewis v Wilson & Horton Ltd*, above n 22, para 76-82 Elias CJ for the Court.

³³⁰ *Suppressing Names and Evidence*, above n 3, 48. Television New Zealand, above n 327, 11.

³³¹ Fairfax Media, above n 327, 13.

factors; help ensure any order is the least infringement on open justice; provide an accessible body of precedent for future decisions; and assist in the determination of appeals.³³²

If penalties are increased – especially where contempt is possible³³³ – it is essential reasons and terms are stated: it must be clear what is permitted and what is prohibited.³³⁴

(b) Register³³⁵

A concern of the media is that they are unable to check the terms of a suppression order and, if not present in court when it is made, may not be aware that an order even exists.³³⁶ The author believes that a national register must be developed to alleviate this issue, especially if penalties are to be increased.

3 *South Australia*

South Australia appears to have struck an appropriate balance. Section 70 of the Evidence Act 1929 (SA) provides that disobedience of a suppression order is punishable by contempt of court, provided the court by which the order was made has the power to punish for contempt.³³⁷ Whether or not the court has that power, an individual that disobeys a suppression order is guilty of an offence.³³⁸ The maximum penalty in the case

³³² Ibid. See also *Lewis v Wilson & Horton Ltd*, above n 22, para 76-82 Elias CJ for the Court.

³³³ *Attorney-General v Leveller Magazine Ltd*, above n 12, 453 Lord Diplock: “[W]here courts, in the interests of the due administration of justice, have departed in some measure from the general principle of open justice no one ought to be exposed to penal sanctions for criminal contempt of court for failing to draw an inference or recognise an implication as to what it is permissible to publish about those proceedings, unless the inference or implication is so obvious or so familiar that it may be said to speak for itself.”

³³⁴ *Attorney General v Punch Ltd* [2003] 1 AC 1046, 1055 (HL) Lord Nicholls of Birkenhead.

³³⁵ It is outside the scope of this paper to consider the advantages, disadvantages and form of a potential national register of suppression orders. For example, it may that the register is made publicly available or access is limited to accredited media organisations and whether it should take the form of an electronic database (potentially with the ability to send email alerts, perhaps for a nominal fee) or physical record.

³³⁶ *Suppressing Names and Evidence*, above n 3, 53.

³³⁷ Evidence Act 1929 (SA), s 70(1).

³³⁸ Evidence Act 1929 (SA), s 70(1a).

of a natural person is \$10,000 or imprisonment for two years, and in the case of a body corporate, a fine of \$120,000. Section 70(2) provides that a person shall not be proceeded against for both a contempt of court and a summary offence.

Moreover, the reasons and terms of each suppression order must be specified³³⁹ and a register is maintained of all this information.³⁴⁰ The register is made available to the public and 'authorised news media representatives' are notified electronically of new entries to the register.³⁴¹

4 *Evaluation and suggested provision*³⁴²

There are two reform options – section 140(5) could be amended and the penalty increased or a new approach could be favoured. The author is of the opinion that a new approach should be adopted that moves away from strict liability and more adequately reflects the potential for varying levels of culpability. The author prefers a tiered penalty regime which distinguishes between penalties for a body corporate and an individual. This approach is favoured because it provides greater clarity as to what the levels of culpability (and associated penalties) are, and distinguishes between body corporate publishers – with greater resources and publication impact and reach – and individual publishers.

While the South Australian approach provides good direction in terms of the degree and types of penalties to be applied to a body corporate and individual, it does not provide clarity as to the varying levels of culpability.

The author suggests the following provision is more suitable:

³³⁹ Evidence Act 1929 (SA), s 69A(8).

³⁴⁰ Evidence Act 1929 (SA), s 69A(8)-(11).

³⁴¹ Evidence Act 1929 (SA), s 69A(11). While it is outside the scope of this paper, the author notes that it could be suggested that making the register freely available to all members of the public could, to some degree, defeat the order itself.

³⁴² This part of the paper is limited to an assessment of the penalty regime; no further analysis is made of the matters of registers and reasons (see Part VII D 2 Two important considerations).

Section 140E Offences

- (1) If a person, with knowledge of an order prohibiting publication of identifying particulars made under section 140A, 140B, 140C or 140D, intentionally breaches, evades, or attempts to evade that section, the person commits an offence and is liable on conviction on indictment, —
 - (a) in the case of an individual, to a fine not exceeding \$30,000 or to a term of imprisonment not exceeding 2 years;
 - (b) in the case of a body corporate, to a fine not exceeding \$300,000.
- (2) If a person contravenes section 140A, 140B, 140C or 140D, and that contravention does not constitute an offence against subsection (1), the person commits an offence and is liable on summary conviction, —
 - (a) in the case of an individual, to a fine not exceeding \$10,000;
 - (b) in the case of a body corporate, to a fine not exceeding \$100,000.
- (3) Nothing in this section limits the power of any court to punish any contempt of court.
- (4) A person shall not, in respect of the same act or default, be proceeded against under this section both for a contempt of court and an offence under subsection (1) or (2).

E Conclusion

The present penalty regime for breach of a suppression order under section 140 is inadequate. In a modern media and technological age, it simply does not provide a meaningful deterrent. The penalties must be increased to reflect the significant interests that are protected by these orders. Any reform must aim to clearly state all possible consequences of offending – particularly the availability of an action in contempt. The public and media need more certainty. Moreover (especially if penalties increase) it is imperative that there be a requirement for the reasons and terms of each name suppression order to be stated clearly and an accessible record of these details to be kept. It must be clear at all times what is permitted and what is prohibited.

It is imperative that this area of name suppression be promptly reformed.³⁴³

³⁴³ Indeed the author notes (while already done within some States in Australia) there is a significant call led principally by Victorian Deputy Premier and Attorney-General Rob Hulls for the establishment of an electronic National Register of Suppression Orders in Australia. This suggestion was proposed to the Standing Committee of Attorneys-General in July 2008 and in November 2008, the Federal Attorney-General announced the commitment of the states and territories of Australia to develop further the framework for a national electronic register of suppression orders. See Premier of Victoria Australia www.premier.vic.gov.au (last accessed 27 September 2009); and Australia's Right to Know "Report of the Review of Suppression Orders and The Media's Access to Court Documents and Information" (13 November 2008) 84.

VIII CONCLUSION

Name suppression is a unique area of law requiring the court to balance a number of conflicting rights set amongst complex personal circumstances. It is a difficult balance to strike. Section 140 confers a broad discretion to suppress the name of any person accused or convicted of an offence, or of any other person connected with the proceedings. No further guidance is provided to assist the court in the exercise of its discretion. While a level of flexibility must always be maintained, it is time that the legislature resolved a number of issues and provided more direction to assist the court. The public and media demand more consistency and transparency.

Defendants will always be unpopular. However in some instances, particularly during the pre-trial stage of proceedings, name suppression for a defendant may be justified. But it must be remembered the process is dynamic, suppression at one stage of a case may not be justified at another. While there are a number of well established principles in name suppression, there is also a notable amount of inconsistency and divergence in the approach to the exercise of the discretion. Particularly the relevance of the presumption of innocence and stage of proceedings to the assessment continue to be contentious issues. These issues need to be clarified.

Section 140 also provides protection to third parties and victims and witnesses. Whether or not the phrase "connected with the proceedings" in section 140 was intended to have a wide or narrow interpretation, there are many sound reasons to justify that a court should have the ability to prohibit, when appropriate, publication of the name of a third party who is only connected to proceedings by virtue of a close relationship to a defendant. Moreover, it is time that the unfairness inherent in having the same considerations and threshold apply to an application for a suppression order, regardless of whether the applicant is a victim, witness or defendant is recognised.

It is imperative that the penalty regime for disobeying a suppression order be reformed. The current regime is inadequate and does not reflect the significant interests

protected by these orders. A more meaningful deterrent must be enacted which clearly states the consequences of disobedience.

Name suppression does not herald the end of open justice. In some instances it will be a justified limitation to restrict publication of the name of a party. However, open justice is so essential to our criminal justice system that publication should always be the norm and suppression must be the exception. In order to ensure the courts strike the appropriate balance it is necessary for the legislature to provide further guidance to assist the court in the exercise of its discretion. The provisions suggested in this paper provide that direction. While the winds of open justice should blow through the workings of the court, publicity in some instances is not the price of justice.

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X APPENDIX

A *Criminal Justice Act 1985, ss 138, 140*

Section 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.

Section 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.

B *Canadian Criminal Code, s 486.5*

- (1) Unless an order is made under section 486.4, on application of the prosecutor, a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.
- (2) On application of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection 486.2(5) or of the prosecutor in those proceedings, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.
- (3) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.
- (4) An applicant for an order shall
 - (a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and
 - (b) provide the notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.
- (5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.
- (6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.
- (7) In determining whether to make an order, the judge or justice shall consider
 - (a) the right to a fair and public hearing;
 - (b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer significant harm if their identity were disclosed;
 - (c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;
 - (d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;
 - (e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;
 - (f) the salutary and deleterious effects of the proposed order;
 - (g) the impact of the proposed order on the freedom of expression of those affected by it; and
 - (h) any other factor that the judge or justice considers relevant.
- (8) An order may be subject to any conditions that the judge or justice thinks fit.

- (9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way
 - (a) the contents of an application;
 - (b) any evidence taken, information given or submissions made at a hearing under subsection (6); or
 - (c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

C Evidence Act 1929 (SA), ss 69A, 70, 71B

69A—Suppression orders

- (1) Where a court is satisfied that a suppression order should be made—
 - (a) to prevent prejudice to the proper administration of justice; or
 - (b) to prevent undue hardship—
 - (i) to an alleged victim of crime; or
 - (ii) to a witness or potential witness in civil or criminal proceedings who is not a party to those proceedings; or
 - (iii) to a child, the court may, subject to this section, make such an order.
- (2) If a court is considering whether to make a suppression order (other than an interim suppression order), the court—
 - (a) must recognise that a primary objective in the administration of justice is to safeguard the public interest in open justice and the consequential right of the news media to publish information relating to court proceedings; and
 - (b) may only make a suppression order if satisfied that special circumstances exist giving rise to a sufficiently serious threat of prejudice to the proper administration of justice, or undue hardship, to justify the making of the order in the particular case.
- (3) Where an application is made to a court for a suppression order, the court may, without inquiring into the merits of the application, make such an order (an *interim suppression order*) to have effect, subject to revocation by the court, until the application is determined; but if such an order is made the court must determine the application as a matter of urgency and, wherever practicable, within 72 hours after making the interim suppression order.
- (4) A suppression order may be made subject to such exceptions and conditions as the court thinks fit and specifies in the order.
- (5) Where an application is made to a court for a suppression order—
 - (a) any of the following persons, namely:
 - (i) the applicant for the suppression order;
 - (ii) a party to the proceedings in which the suppression order is sought;
 - (iii) a representative of a newspaper or a radio or television station;
 - (iv) any person who has, in the opinion of the court, a proper interest in the question of whether a suppression order should be made, is entitled to make submissions to the court on the application and may, with the permission of the court, call or give evidence in support of those submissions;
 - (b) the court may (but is not obliged to) delay determining the application to make possible or facilitate non-party intervention in the proceedings under paragraph (a)(iii) or (iv).
- (6) A suppression order may be varied or revoked by the court by which it was made, on the application of any of the persons entitled to make submissions by virtue of subsection (5)(a).
- (7) On an application for the making, variation or revocation of a suppression order—
 - (a) a matter of fact is sufficiently proved if proved on the balance of probabilities;
 - (b) if there appears to be no serious dispute as to a particular matter of fact, the court (having regard to the desirability of dealing expeditiously with the application) may—
 - (i) dispense with the taking of evidence on that matter; and
 - (ii) accept the relevant fact as proved.
- (8) If a court makes a suppression order, the court must—
 - (a) as soon as reasonably practicable forward to the Registrar a copy of the order; and

- (b) except in the case of an interim suppression order—within 30 days, forward to the Attorney-General a report setting out—
 - (i) the terms of the order; and
 - (ii) the name of any person whose name is suppressed from publication; and
 - (iii) a transcript or other record of any evidence suppressed from publication; and
 - (iv) full particulars of the reasons for which the order was made.
- (9) If a court orders the variation or revocation of a suppression order, the court must as soon as reasonably practicable forward a copy of the order to the Registrar.
- (10) The Registrar—
 - (a) will establish and maintain a register of all suppression orders; and
 - (b) will, immediately after receiving a copy of a suppression order, or an order for the variation or revocation of a suppression order, enter the order in the register; and
 - (c) will, when an order is entered in the register, immediately transmit by fax, email or other electronic means notice of the order to the nominated address of each authorised news media representative.
- (11) The register will be made available for inspection by members of the public free of charge during ordinary office hours.
- (12) Without limiting the ways in which notice of a suppression order, or an order varying or revoking a suppression order, may be given, the entry of such an order in the register is notice to the news media and the public generally (within and outside the State) of the making and terms of the order.
- (13) In this section—

authorised news media representative means a person—

- (a) who is nominated by a member of the news media to be the member's authorised representative for the purpose of receiving notices under subsection (10)(c); and
- (b) who has given the Registrar a notice specifying the representative's nominated address for the receipt of notices under subsection (10)(c); and
- (c) who has paid the relevant fee or fees (which may consist of, or include, periodic fees) fixed by the regulations;

nominated address of a nominated representative means the fax number, email address or other address for the receipt of electronic communications nominated by the representative as the address to which notices may be sent to the representative by the Registrar under subsection (10)(c);

Registrar means a person to whom the functions of the Registrar under this section are assigned by the Attorney-General.

70—Disobedience to orders under this Division

- (1) If a person disobeys an order under this Division and the court by which the order was made has power to punish for contempt, the person is guilty of a contempt of the court.
- (1a) If a person disobeys an order under this Division, whether or not the court by which the order was made has power to punish for contempt, the person is guilty of an offence.

Maximum penalty:

- (a) in the case of a natural person—\$10 000 or imprisonment for 2 years;
- (b) in the case of a body corporate—\$120 000.
- (2) A person shall not, in respect of the same act or default, be proceeded against under this section both for a contempt of court and a summary offence.

71B—Publishers required to report result of certain proceedings

- (1) Where—
 - (a) a report of proceedings taken against a person for an offence is published;
 - (b) the report identifies the person against whom the proceedings have been taken or contains information tending to identify that person;
 - (c) the report is published before the result of the proceedings is known;
 - (d) those proceedings do not result in conviction of the person to whom the report relates of the offence with which he was charged, the person by whom the publication is made shall, as soon as practicable after the determination of the proceedings, publish a fair and accurate report of the result of the proceedings with reasonable prominence having regard to the prominence given to the earlier report.

Maximum penalty:

- (a) in the case of a natural person—\$10 000;
 - (b) in the case of a body corporate—\$120 000.
- (2) A person required under subsection (1) to publish a report of the result of proceedings may apply to the Supreme Court for directions in relation to the manner in which he should comply with that subsection.
- (3) Where—
- (a) a report of proceedings taken against a person for an offence is published;
 - (b) the report identifies the person against whom the proceedings have been taken or contains information tending to identify that person;
 - (c) the report is published after the result of the proceedings is known;
 - (d) those proceedings did not result in conviction of the person to whom the report relates of the offence with which he was charged, the person by whom the publication is made shall include prominently in the report a statement of the result of the proceedings.

Maximum penalty:

- (a) in the case of a natural person—\$10 000;
 - (b) in the case of a body corporate—\$120 000.
- (4) In this section—
proceedings includes, in relation to an offence, the laying of a charge of the offence.

D Author-suggested Provisions, ss 140A, 140B, 140C, 140D, 140E

Section 140A Publication of the identifying particulars of a person charged with an offence before first court appearance prohibited

Except as otherwise expressly provided in any enactment, publication of the name, address, occupation or any identifying particulars of a person charged with an offence before they appear in court is prohibited unless that person consents to publication.

Section 140B Court may prohibit publication of identifying particulars of defendant

- (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 any offence, of the name, address or occupation of any defendant, or any particulars likely to lead to any such person's identification, if that court is satisfied that publication would –
- (a) for any reason not be in the interests of justice;
 - (b) cause undue hardship to the complainant or victim; or
 - (c) cause a risk of prejudice to a fair and impartial trial.
- (2) In considering whether to make such an order, the court must recognise –
- (a) that a primary objective in the administration of justice is to safeguard the public interest in open justice and the consequential right of the news media to publish information relating to court proceedings; and
 - (b) the stage of the proceedings at which the application is made.
- (3) In considering whether to make such an order, the court shall consider –
- (a) whether there is a real and substantial risk that the defendant would suffer significant and disproportionate harm if their identity was disclosed;
 - (b) whether effective alternatives are available to protect the identity of the defendant;
 - (c) the impact of the proposed order on the freedom of expression of those affected by it;
 - (d) in pre-conviction (or acquittal) applications, the right of the defendant to be presumed innocent until proved guilty according to law;
 - (e) whether the public interest requires that the identifying particulars of the defendant not be suppressed;

- (f) the salutary and deleterious effects of the proposed order; and
 - (g) any other factor that the judge or justice considers relevant at this stage of the proceedings.
- (4) The court may only make a suppression order if it is satisfied that in the circumstances there is a sufficient threat to the interests of justice, to a risk of prejudice to a fair and impartial trial, or to the undue hardship to the complainant or victim, to justify the making of the order in the particular case.

Section 140C Court may prohibit publication of identifying particulars of third parties

- (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 any offence, of the name, address or occupation of any third party connected with the proceedings, directly or by virtue of a relationship of sufficient connection with a party to the proceedings, or any particulars likely to lead to any such person's identification, if that court is satisfied that publication would –
- (a) for any reason not be in the interests of justice;
 - (b) endanger the safety of any person; or
 - (c) cause undue hardship to the third party.
- (2) In considering whether to make such an order, the court must recognise –
- (a) that a primary objective in the administration of justice is to safeguard the public interest in open justice, the right to a fair and public hearing, and the consequential right of the news media to publish information relating to court proceedings; and
 - (b) the stage of the proceedings at which the application is made.
- (3) In considering whether to make such an order, the court shall consider –
- (a) whether there is a real and substantial risk that the third party would suffer significant and disproportionate harm if their identity were disclosed;
 - (b) whether effective alternatives are available to protect the identity of the third party;
 - (c) the impact of the proposed order on the freedom of expression of those affected by it;
 - (d) whether the public interest requires that the identifying particulars of the third party not be suppressed;
 - (e) the salutary and deleterious effects of the proposed order; and
 - (f) any other factor that the judge or justice considers relevant at this stage of the proceedings.
- (4) The court may only make a suppression order if it is satisfied that in the circumstances there is a sufficient threat to the interests of justice, the safety of any person, or to the undue hardship to the third party, to justify the making of the order in the particular case.

Section 140D Court may prohibit publication of identifying particulars of complainants, victims and witnesses

- (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 any offence, of the name, address or occupation of any complainant, victim or witness connected with the proceedings, or any particulars likely to lead to any such person's identification, if that court is satisfied that publication would –
- (a) for any reason not be in the interests of justice;
 - (b) endanger the safety of any person; or

- (c) cause undue hardship to the complainant, victim or witness.
- (2) In considering whether to make such an order, the court must recognise –
- (a) that a primary objective in the administration of justice is to safeguard the public interest in open justice, and the consequential right of the news media to publish information relating to court proceedings;
 - (b) the distinct place of complainants, victims and witnesses in the criminal justice process and the need to respect this position;
 - (c) the right of a defendant to a fair and public hearing; and
 - (d) the stage of the proceedings at which the application is made.
- (3) In considering whether to make such an order, the court shall consider –
- (a) whether there is a real and substantial risk that the complainant, victim or witness would suffer significant and disproportionate harm if their identity were disclosed;
 - (b) whether the complainant, victim or witness needs the order for their security or to protect them from intimidation or retaliation;
 - (c) society's interest in encouraging the reporting of offences and the participation of complainants, victims and witnesses in the criminal justice process;
 - (d) the Victims' Rights Act 2002;
 - (e) whether effective alternatives are available to protect the identity of the complainant, victim or witness;
 - (f) the impact of the proposed order on the freedom of expression of those affected by it;
 - (g) whether the public interest requires that the identifying particulars of the complainant, victim or witness not be suppressed;
 - (h) the salutary and deleterious effects of the proposed order; and
 - (i) any other factor that the judge or justice considers relevant at this stage of the proceedings.
- (4) The court may only make a suppression order if it is satisfied that in the circumstances there is a sufficient threat to the interests of justice, the safety of any person, or to the undue hardship to the complainant, victim or witness, to justify the making of the order in the particular case.

Section 140E Offences

- (1) If a person, with knowledge of an order prohibiting publication of identifying particulars made under section 140A, 140B, 140C or 140D, intentionally breaches, evades, or attempts to evade that section, the person commits an offence and is liable on conviction on indictment, —
- (a) in the case of an individual, to a fine not exceeding \$30,000 or to a term of imprisonment not exceeding 2 years;
 - (b) in the case of a body corporate, to a fine not exceeding \$300,000.
- (2) If a person contravenes section 140A, 140B, 140C or 140D, and that contravention does not constitute an offence against subsection (1), the person commits an offence and is liable on summary conviction, —
- (a) in the case of an individual, to a fine not exceeding \$10,000;
 - (b) in the case of a body corporate, to a fine not exceeding \$100,000.
- (3) Nothing in this section limits the power of any court to punish any contempt of court.
- (4) A person shall not, in respect of the same act or default, be proceeded against under this section both for a contempt of court and an offence under subsection (1) or (2).



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