REX WOODHOUSE

PRE-JUDGMENT NAME SUPPRESSION IN CRIMINAL CASES

LLM RESEARCH PAPER

CENSORSHIP AND THE FREEDOM OF EXPRESSION - LAWS 520

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2007

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I ABSTRACT

This paper aims to consider the issue of name suppression in criminal cases, and to discuss whether the law should be developed to allow for the automatic suppression of an accused's name, prior to a judgment being delivered on the substance of their case. This paper will examine in moderate detail the current New Zealand law regarding name suppression, from its origins in the common law, to the current day where a significant proportion of the relevant law is found in statute. Important to that examination will be an identification of considerations made by the New Zealand court when considering an application for suppression of name. This paper considers the broad tension which exists between important and competing principles, those being the principle of open justice and freedom of expression, against the interests of the accused including their privacy interest.

The paper concludes with a discussion of the arguments for and against automatic suppression of name prior to a judgment being issued. The author concludes by supporting that the law should be developed to provide an automatic suppression of name for the accused, with the ability for an application to be made to the court to allow the release and publication of the name.

A *Statement on Word Length*

The total word count is 16 210 words, not including footnotes, abstract or appendices.

II INTRODUCTION

The aim of this paper is to discuss the issue of pre-conviction name suppression, and to discuss whether New Zealand law should be developed. In particular, this paper will examine the issues and law surrounding name suppression, and discuss the concept of automatic name suppression for defendants in criminal proceedings, prior to a judgment on the substantive matter being given. The paper will begin by considering the current state of the law regarding suppression of information from the courts, and then consider arguments for and against the automatic suppression of the defendant's name.

The New Zealand law regarding name suppression has developed in line with most common law jurisdictions, allowing for publication of the defendants name as the starting point. That is on the basis of the principle of open justice. An important aim of that principle is to ensure the public can 'see for themselves' what happens in our courts, and be assured the criminal processes are sound. In New Zealand a long line of cases have confirmed the importance of the principle of open justice.[1]

Closely aligned to the principle of open justice is the principle of freedom of expression. Arguably there is a tension between those principles and the interests of the accused, and particularly their privacy interest. That privacy interest may also apply to persons associated with the defendant such as family members and colleagues.

Overlying these concepts, is the fundamental principle that a person is innocent until proven guilty. The practical reality is that many people will consider a person a guilty due merely to the fact they are charged with an offence. It is unfortunate that for a proportion of the community, they will continue to view the person as blameworthy even when acquitted or if the charges are withdrawn.

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[1] For example: *Broadcasting Corporation of New Zealand v A-G* [1982] 1 NZLR 120 (CA), *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, *R v Bain* (1996) 3 HRNZ 108 (CA).

Nevertheless, the starting point for the courts is to release information unless there are compelling reasons not to. The courts will make orders no wider than needed to achieve the desired purpose of a suppression order.[2] The courts will only restrict freedom of expression to the extent necessary to protect some countervailing right or interest.[3]

Historically, suppression of information in a proceeding has been provided for in the common law and from the inherent jurisdiction of the court. In more recent years, Parliament has intervened to legislate when and how name suppression is to be applied in particular circumstances, and has extinguished the courts inherent jurisdiction in this area.[4]

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[2] *Police v O'Connor* [1992] 1 NZLR 87.
[3] Ibid.
[4] *R v X (an accused)* [1987] 2 NZLR 240.

III THE PRINCIPLE OF OPEN JUSTICE

"...justice should not only be done, but should manifestly and undoubtedly be seen to be done."[5]

A Overview of the Principle

The principle of open justice ("the principle") requires that court proceedings be conducted in the open, and accessible to the public and media. This also means evidence presented in court can be considered or reported by those present.[6] In common law jurisdictions, the origin of the principle can be found within the common law itself. In New Zealand today, the principle can be found in a number of statutes as well as the common law.[7,8] The principle itself has resulted in many rules which generally either ensure proceedings remain open, or alternately set the boundary of any restriction of reporting on proceedings. Any restriction of reporting in criminal cases is only permissible in limited special situations.[9] As stated in *Victim X* "[open justice] is to be applied in this particular case, as in all criminal cases, unless compelling reason or special circumstances exist."[10]

One of the first reported cases confirming the importance of the principle, is the 1913 House of Lords judgment of *Scott v Scott*.[11] That judgment has since been confirmed in a long line of cases including *Attorney-General v Leveller Magazine Ltd*.[12] In this later decision, the Court confirmed that hearings should

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[5] *Rex* v. *Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, Hewart CJ.

[6] The principle of open justice should not be confused with the right to freedom of expression. While the two are supportive of each other, their focus remains different. See for example *Victim X v Television New Zealand Ltd* [2003] 3 NZLR 220.

[7] New Zealand Bill of Rights Act 1990, s14.

[8] See for example *R v Felixstowe* [1987] QB 582, 591 Watkins LJ.

[9] See for example *Victim X* [2003] 3 NZLR 220, *Serious Fraud Office v Singh* (28 August 2007) HC AK CRI-2007-404-219, Courtney J.

[10] *Victim X v Television New Zealand Ltd* [2003] 3 NZLR 220.

[11] *Scott v Scott* [1913] AC 417.

[12] *Attorney-General v Leveller Magazine Ltd* [1979] AC 440.

be held in an open court, where the public and media are free to hear all argument and evidence. In the *Leveller* case, Lord Diplock states:

> The application of this principle of open justice has two aspects: as 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.

In New Zealand, the principle can be found in section 25 of the New Zealand Bill of Rights Act 1990, which holds that a person charged with an offence has the right to a "fair and public hearing by an independent and impartial court." A similar principle can be found in the Sixth Amendment to the Constitution of the United States of America, which provides the accused the right to a "speedy and public trial". The principle is now well settled in the New Zealand Criminal Law, having been confirmed in many judgments. [13] While there is some ability for the court to suppress information within a proceeding, the extent of the courts ability is heavily limited. The leading New Zealand case regarding suppression of information within a proceeding is *R v Liddell*, where Cooke P held that:

> What has to be stressed is that the prima facie presumption as to reporting is always in favour of openness…
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> …
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> …In the present case we are driven to think that the learned Judge, undoubtedly actuated by the promptings of humanity, somewhat underrated the general public importance of open reporting.[14]

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[13] For example: *Broadcasting Corporation of New Zealand v A-G* [1982] 1 NZLR 120 (CA), *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, *R v Bain* (1996) 3 HRNZ 108 (CA).

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

The principle of open justice should not be confused with the right to freedom of expression. While the two are supportive of each other, their focus remains different.[15]

B Benefits of Open Proceedings

There are many benefits for both the judiciary and the public from holding proceedings in open court. There could be little doubt the judiciary serve an important public function. In order to properly execute that function, it is vital the public view the courts as being beyond reproach, and as a result have confidence in the justice system. While these considerations are important for both the civil and criminal courts, these considerations are particularly important in the criminal system given the role of the criminal justice system in the functioning of our society. Having the courts open serves to ensure the public can see the courts are operating as they should.[16] Lord Steyn expressed the importance of the principle as follows: [17]

> A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glair of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the value of the rule of law.

In *Scott v Scott*, Lord Atkinson acknowledged that a hearing in public may be humiliating and painful for the accused, but that was to be accepted for the greater good of society:

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[15] *Victim X v Television New Zealand Ltd* [2003] 3 NZLR 220.
[16] *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120, 127.
[17] *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 603.

> The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injury public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.

That reasoning was later confirmed by Lord Diplock in *Attorney-General v Leveller Magazine Ltd*:[18]

> As a general rule the English system of administering justice does require that it be done in public: *Scott v Scott* [1913] AC 417. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness and idiosyncrasy and maintains the public confidence in the administration of justice.

C Interests of Justice

A further important consideration, and one which is not always congruent with an open court, is the consideration of what is in the interests of justice. Viscount Haldane in *Scott v Scott* confirmed the securing of justice is a more important requirement than the openness of the courts, and that at times, the openness principle must be subservient to the interests of justice:[19]

> ...While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done.

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[18] *Attorney-General v Leveller Magazine Ltd* [1979] AC 440.
[19] *Scott v Scott* [1913] AC 417.

In *Broadcasting Corporation of New Zealand v Attorney-General*, Woodhouse P confirmed the importance of securing justice as expressed in *Scott v Scott*:[20]

> ...[Scott v Scott] demonstrates how jealous the Judges have always been to preserve the fundamental principle that justice is to be administered openly and publicly; and that any departure from that principle must depend not on judicial discretion but the demands of justice itself.

In the recent Court of Appeal judgement of *R v B* William Young P, Robertson and Baragwanath JJ, confirmed the overriding requirement of any decision to suppress information, was to meet the interests of justice:[21]

> Here the Judge felt himself bound by the emphatic language of this Court in R v Proctor [1997] 1 NZLR 295, as to the importance of open justice, to deny suppression of the appellant's name...There is need for careful identification of the parties whose interests are at stake and the recognition and evaluation of a number of competing factors. Among them are the desirability that justice be open, the presumption of innocence, the need to maintain confidence in the court, and the overriding requirement that the trial be fair.

Similarly, Justice Fogarty in a recent High Court preliminary judgment, confirmed the supremacy the requirement to secure justice, over the general principle of open justice. His Honour confirmed that when considering any limitation on the open justice principle, the starting point should always be the need for open justice as required by section 138 of the Criminal Justice Act 1985, unless the statutory exceptions are met, or a departure is required to ensure justice is done in a "principled way by exercise of the Court's inherent jurisdiction to control the trial".[22]

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[20] *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120, 122.
[21] *R v B* (CA 459/06) [2008] NZCA 130, William Young P, Robertson and Baragwanath JJ.
[22] *R v Sila* (6 May 2008) HC Christchurch CRI 2007-009-006120, para 11, Fogarty J.

The securing of justice, is not only for the benefit of the victim and society, but importantly the accused.[23] Section 138(2) of the Criminal Justice Act 1985 makes specific reference to the 'interests of justice', as being a consideration as to when certain information in a proceeding may be suppressed.

[23] Burrows (ed) *Media Law In New Zealand* (3 ed, Oxford University Press, Auckland, 1999).

IV LIMITATIONS TO THE PRINCIPLE OF OPEN JUSTICE

As noted above, the principle of open justice is not absolute. Information may in limited circumstances be suppressed. In *Leveller*, Lord Diplock noted that as the purpose of the principle was to serve the needs of justice, there would be times when it was necessary to depart from the openness principle, where to do otherwise would adversely effect the application of justice. [24] That approach has been endorsed in a number of New Zealand judgments such as *Broadcasting Corporation of New Zealand v Attorney-General*, and *Police v O'Connor*, where Thomas J held "[i]t is therefore axiomatic that the principle of open justice must be balanced against the objective of doing justice". [25]

The openness principle in a criminal proceeding will only yield where its application would frustrate the interests of justice in that case. Even then any departure from the principle will only be permitted to the minimum extent necessary.[26] Any departure will depend on the circumstances of the individual case, and in cases of serious charges, will seldom be granted. Limits exist to the form and types of information which must be made available to meet the open justice requirement. For example, in *R v Mahanga*, the court held that the needs for open justice were met by having the hearing open to the public. [27] In that case, the court rejected a request for a copy of a video recording of an interview with the accused, which had been produced during the trial.

In any application to depart from the open justice principle, the onus will sit with the applicant to demonstrate a departure should be granted.[28] The courts have refused to develop set rules for when a request to suppress information will be granted. However, the typical factors the courts consider with any application include:

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[24] *Attorney-General v Leveller Magazine Ltd* [1979] AC 440.
[25] *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120, *Police v O'Connor* [1992] 1 NZLR 87.
[26] *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120, 128.
[27] *R v Mahanga* [2001] 1 NZLR 641.
[28] *Victim X* [2003] 3 NZLR 220.

(a) Whether the absence of publicity will cause suspicion to fall on others;

(b) The ability of members of the public, or colleagues, to decide whether they wish to retain contact with the accused;

(c) The likelihood of publicity leading to the discovery of new evidence;

(d) The potential for the accused to re-offend;

(e) The likelihood of other victims coming forward as a result of publication;

(f) Whether publicity would prejudice the ability of the accused to receive a fair trial.[29]

The common law has recognised the extent of any limitation to the principle will depend on the stage of the proceeding. For example, sentencing must in all cases be given in open court, and no part can take place in chambers.[30] However the courts are more willing to grant a suppression order prior to a trial.

A Chambers Hearings

Given a hearing in chambers is a closed sitting, the effect is to exclude the public and media. In criminal proceedings, the extent to which chambers hearings can be undertaken are limited as a result of section 138 of the Criminal Justice Act 1985, which relates to the courts powers to clear the court.[31] This section requires that "sittings" of the court which relate to criminal proceedings,

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[29] R *v Liddell* [1995] 1 NZLR 538 (CA).
[30] R *v X (an accused)* [1987] 2 NZLR 240, *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546.
[31] Appendix 1.

be undertaken in open court, with only limited and specific exceptions.[32] The result is that chambers hearings in the criminal jurisdiction will be for merely incidental or procedural matters. In *Lewis v Wilson and Horton*, the Court of Appeal was critical that submissions had been received in the District Court in chambers, and as such important information had not been disclosed in open court.

B Statutory Limitations to the Principle

Limitations to the principle can be found in statute and case law. In New Zealand, there are a number of automatic statutory restrictions on the publication of information from open court proceedings. In these cases, no order is required from the court before the suppression requirement becomes effective. The primary criminal provisions allowing for broad suppression of information are sections 138 – 140 of the Criminal Justice Act 1985.[33] Any application of these provisions must be no wider than necessary to achieve the aim of justice, and the order must be explicit and precise.[34]

Other statutory limitations can be found in the following Acts:

(a) Bail Act 2000, ss18 – 19 (court may prohibit information from bail hearings);

(b) Crimes Act 1961, s375A (automatic prohibition of publication of information relating to cases of sexual offending);

(c) Children, Young Persons, and Their Families Act 1989, s329 (access to court proceeding where the accused is a youth is limited);

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[32] See also *R v X (an accused)* [1987] 2 NZLR 240, 244.
[33] Appendix 1.
[34] *Police v O'Connor* [1992] 1 NZLR 87.

(d) Evidence Act 1908, s15 (allows for the prohibition of questions to be published);

(e) Summary Proceedings Act 1957, s185C (restriction of publication of complaints and evidence from child complainant).

V OPEN JUSTICE AND THE MEDIA

The media have a special and crucial role in the operation of an open justice system.[35] As held by Justice Frankfurter in *Pennekamp v State of Florida*:[36]

> A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other, both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press.

Many judgments have expressed the role of the media as being a 'surrogate' of the public, given that only limited numbers of people can be present in a court sitting. As stated by Cooke P in *R v Liddell*:[37]

> The starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as 'surrogates' of the public.

A Ability of the Media to Appeal Suppression Orders

Given the important role of the media in the open court, that role has developed beyond being a mere witness in a proceeding. The courts have confirmed the media have standing to challenging the grant of a suppression order, and may seek to have any order discharged, rescinded or varied. In *R v L*, Smellie J stated:[38]

> Nonetheless it is clear that in New Zealand the media does have standing to apply for suppression orders to be discharged, rescinded or varied. That is clear from two Court of Appeal decisions, namely Re Wellington Newspapers Ltd's Application [1982] 1

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[35] *Police v O'Connor* [1992] 1 NZLR 87, *R v Felixstowe* [1987] QB 582, 591.
[36] *Pennekamp v State of Florida* 328 US 331 (1946) 335.
[37] R *v Liddell* [1995] 1 NZLR 538 (CA).
[38] R *v L* [1994] 1 NZLR 568, 569.

NZLR 118 and Broadcasting Corporation of New Zealand v Attorney-General [1982] 1 NZLR 120…

In *Lewis v Wilson & Horton*, the Court of Appeal confirmed the media had standing to bring an application for judicial review. This was on the basis that the media was the "watchdog for the public".[39] However, in *Fairfax New Zealand v C*, the Court of Appeal held the media had limited rights to challenge interim suppression orders.[40] In that case the Court was not prepared to take a liberal interpretation of the law in finding the media organisation to be a "party", so as to grant jurisdiction in terms of the Criminal Justice Act 1985. The Court confirmed it was open to the media to challenge a decision of the court to grant an order only for permanent name suppression.

B The Courts Ability to Limit Media in Court

The importance of the media in the open court, is reflected in the Criminal Justice Act 1985, which as noted above provides the primary ability to suppress information in a criminal proceeding. However, the Act expressly limits the ability of the court to exclude accredited news media. Section 138 gives the court the power to clear the court, and to forbid the reporting of a proceeding. However that is limited by section 138(3) which holds:

> 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.

While the author can find no case which has considered what an "accredited news media reporter" is, it is clear that the news media have a broad

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[39] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546.
[40] *Fairfax New Zealand v C* [2008] NZCA 39.

ability as of right to attend full criminal proceedings, a right not held by the general public.[41]

However the ability of the media to film in court has recently come under challenge from Justice Fogarty in an extensively reasoned preliminary decision in the case of *R v Sila*.[42] Justice Fogarty expressed the view that the media's ability to film proceedings as allowed for in the Ministry of Justice 'in-court media guidelines', went beyond what would be allowable in law.[43] [44] His honour considered the role of the court was to discharge a public duty which was to secure that justice is done accordingly to the law. His Honour held the decision to agree to allow filming of a proceeding is not a discretion for the court, rather it flows as a consequence of the courts overarching duty to secure justice:

> [The in-court media guidelines] cast the role of the trial judge as exercising a discretion, when setting the scope of media coverage of the trial. Rather the Judge is discharging a duty to secure that justice be done, according to law, exercisable only on a principled basis. That duty includes a duty on the Judge to take positive steps if necessary to secure that the evidence is unaffected by media coverage of the trial...

Justice Fogarty distinguished the effects of the media filming and photographing a defendant and witnesses, when compared with the effects of a reporter being in court and reporting on the evidence and argument observed. His Honour held that "I know of no common law authority that has articulated a principle that filming and photographing is a simple alternative to observation in Court by reporters." In that case Justice Fogarty went on to limit the ability of the media to film and photograph the trial, but he did not apply any restrictions to general court reporting. In this case at least the court was willing to distinguish the form or mode of reporting.[45]

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[41] The term "accredited news media reporter" is also found in section 137(1)(g) of the Care of Children Act 2004, but again is not defined.

[42] *R v Sila* (6 May 2008) HC Christchurch CRI 2007-009-006120, Fogarty J.

[43] Ibid.

[44] *In-court media coverage guidelines*, Ministry of Justice, 2003.

VI PRIVACY

Privacy is a developing area of the law in New Zealand. Skegg described the concept of privacy as being the ability of a person to permit collection and to control sensitive information about them.[46] The right to be free from invasion of a persons home, property or person have long been protected under both the civil and criminal law. However there has traditionally been no general right to protect ones privacy from invasion. More recent times have seen the introduction of the Privacy Act 1993, and judicial recognition of the emerging tort of privacy in the Judgment of *Hosking v Runting*.[47] The privacy right identified by the Court in *Hosking* has been applied in a number of other judgments.[48]

The courts have recognised that some facts which might be very sensitive can become public as a result of the criminal justice system. In *Television New Zealand Ltd v R*, a case relating to suppression orders in the 'David Bain case', the Court of Appeal observed that "[t]he criminal justice system itself requires that some highly offensive facts, once private, do become public".

A Privacy Act 1993

The Privacy Act 1993 ("Privacy Act") established a range of information privacy principles which relate to the, collection, storage, use, retention and disclosure of personal information. The Privacy Act also established the Office of the Privacy Commissioner. The Act allows for any person to bring a complaint to the Privacy Commissioner regarding a proposed breach of the principles contained within the Privacy Act. The Privacy Act also allows the

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[46] Skegg and Patterson (eds) *Medical Law in New Zealand* (1st ed, Brookers, Wellington, 2006) 262.
[47] *Hosking v Runting* [2005] 1 NZLR 1.
[48] See for example, *P v D & Independent News Auckland Ltd* [2000] 2 NZLR 591 where the tort was used to restrain the release of a persons sensitive mental health information.

Commissioner to develop specific privacy codes, however no codes have been developed which are of direct relevance to the criminal law jurisdiction.[49]

B Privacy Protection in New Zealand - Tort of Privacy

The New Zealand and English courts have diverged in approach with issues of privacy. The New Zealand Court of Appeal in *Hosking v Runting* declared it was not prepared to follow the English approach which was to expand the boundaries of the law of breach of confidence. The Court in *Hosking* preferring to identify a separate right to privacy. A significant factor for the New Zealand Court of Appeal in supporting a separate cause of action for privacy, was to reduce confusion with the well established tort of breach of confidence. The Court held:[50]

> It will be conducive of clearer analysis to recognise breaches of confidence and privacy as separate causes of action.
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> ...
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> Privacy and confidence are different concepts. To press every case calling for a remedy for unwarranted exposure of information about the private lives of individuals into a cause of action have as its foundation trust and confidence would be to confuse those concepts.

In the High Court judgment of *P v D,* Nicholson J applied the privacy tort as recognised in *Hosking*.[51] In that case, an injunction was granted prohibiting a newspaper publication of information relating to public figure who had been assisted by the Police during an episode of being mentally unwell. The court determined there was insufficient information to found a breach of confidence, however an injunction was allowed on the basis that publication of details of the persons medical emergency would result in "unwarranted publication of intimate

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[49] See for example, Health Information Privacy Code 1994.
[50] *Hosking v Runting* [2005] 1 NZLR 1, 45, 48.
[51] *P v D & Independent News Auckland Ltd* [2000] 2 NZLR 591.

details of … private life which were outside the realm of legitimate public concern or curiosity."[52] Nicholson J accepted that disclosure of events during psychiatric care would constitute a considerable intrusion on private facts, sufficient to tip the balance against allowing for freedom of expression of the media. On that basis the Court found the defence of legitimate public interest was not made out.

C Privacy Protection in the United Kingdom – Breach of Confidence

Over the last decade, there have been significant developments in the law relating to privacy in the United Kindom, primarily due to the effect of the *European Convention on Human Rights* ("ECHR") which in Article 8 contains a right to private and family life, home and correspondence.[53] The ECHR came into force in the United Kingdom in 2000.

The courts in England have declined to develop a privacy tort, preferring to develop the cause of action for breach of confidence.[54] As stated in *OBG Ltd v Allan* "English law knows no common law tort of invasion of privacy"[55] Traditionally to make out an actionable breach of confidence, the applicant must prove the following:[56]

(a) the information had a necessary quality of confidence;

(b) the information was disclosed in circumstances giving rise to an obligation of privacy;

(c) there was an unauthorised use of that information to the detriment of the person originally communicating it.

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[52] As stated in *Tucker v News Media Ownership Ltd* (22 October 1986) HC WN CP 477/86, 6 Jeffries .
[53] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 10 December 1948, Council of Europe, ETS No 005, (entered into force generally on 3 September 1953).
[54] See for example *Campbell v MGN Ltd* [2004] UKHL 22.
[55] *OBG Ltd v Allan; Douglas v Hello! Ltd* [2007] 2 WLR 920, [272].
[56] *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.

However, as a result of *Campbell v MGN Ltd*, the English courts have loosened the criteria for making out a breach of confidence.[57] The applicant now does not need to show the information was first obtained in circumstances which gave rise to a duty of confidence. In the *Campbell* case, the applicant was well known model Naomi Campbell who was photographed leaving an Narcotics Anonymous meeting. The publisher was found liable for publishing the photographs, despite there being no duty of confidence or breach of a confidential relationship between the complainant and the photographer.

Subsequent judgments have confirmed the approach taken in *Campbell*, but not without some disquiet. For example in *Ash v McKennitt*, the English Court of Appeal recognised that a:[58]

> ...feeling of discomfort arises from the action for breach of *confidence* being employed where there was no pre-existing relationship of confidence between the parties, but the 'confidence' arose from the defendant having acquired by unlawful or surreptitious means information that he should have known he was not free to use ...

1 Defences for Breach of Confidence

Three primary defences exist in the common law against a claim of a breach of confidence. These are:

(a) consent to the disclosure, or a waiver of any requirement for confidentiality;

(b) a statutory authority for disclosure;

(c) where public interest outweighs the duty of confidence.

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[57] *Campbell v MGN Ltd* [2004] UKHL 22.
[58] *Ash v McKennit* [2006] EWCA Civ 1714, 80, 86.

Bingham LJ in *W v England* confirmed the law does not consider confidentiality "as absolute but as able to be overridden where there is a stronger public interest in disclosure."[59] To succeed in a public interest defence there typically needs to be some imminent harm which would likely result but for the disclosure.[60] The circumstances of what would fall within the scope of public interest is broad, and includes the administration of justice and public safety. Various English statutes exist to protect the non-consented release of confidential information in specific circumstances.[61]

D Other European Privacy Developments

Recent European cases suggest a willingness to recognise a greater interest in personal privacy. In *Von Hannover*, Princess Caroline sought an injunction of the publication of photographs. Those included photographs of herself with her children, with a male friend in a restaurant, undertaking sporting events, at the beach with her husband, and on holiday. The German Federal Court granted the injunction with regard to the photographs taken in the restaurant and the images of the Princess with her children. At appeal, the European Court of Human Rights was asked to uphold the request with regard to the balance of the photographs. That Court determined the benchmark upon which an analysis of article 8 must proceed, and recognised the:[62]

> ...fundamental importance of protecting private life from the point of view of the development of every human being's personality...extends beyond the private family circle and also includes a social dimension ... anyone, even if they are known to the general public, must be able to enjoy a 'legitimate expectation' of protection of and respect for their private life.[63]

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[59] *W v England* [1990] 1 All ER 835 (CA) 848.
[60] *Smith v Jones* (1999) 169 DLR (4th) 385.
[61] In New Zealand see for example the Protected Disclosures Act 2000, and rule 11(2)(d) of the Health Information Privacy Code.
[62] *Von Hannover v Germany* [2004] ECHR 294.
[63] *Von Hannover v Germany*, ibid, 69.

The court recognised that "increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data".[64] The *Von Hannover* case was notable regarding the courts willingness to protect a persons privacy, even when the circumstances of the intrusion (the photographs) was of seemingly ordinary every day public conduct. This decision could be contrasted with the English Court of Appeal decision in *Campbell,* where the Court indicated that where the conduct photographed was ordinary, there would be no ensuing invasion of privacy.[65] Similarly, in the English case of *Murray v Express Newspapers PLC*, the Court rejected an action for a proposed breach of privacy where a covert photographer had taken photographs of Murray's 18 month old child.[66] In dismissing this case, Patten J held:[67]

> If a simple walk down the street qualifies for protection then it is difficult to see what would not. For most people who are not public figures in the sense of being politicians or the like, there will be virtually no aspect of their life which cannot be characterised as private. Similarly, even celebrities would be able to confine unauthorised photography to the occasions on which they were at a concert, film premiere or some similar function.

However, at appeal, the Court of Appeal took a view more inline with the European Court of Human Rights in *Von Hannover*, in holding that:[68] [69]

> We do not share the predisposition identified by the judge … that routine acts such as a visit to a shop or a ride on a bus should not attract any reasonable expectation of privacy. All depends on the circumstances.

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[64] *Von Hannover v Germany*, ibid, 70.
[65] *Campbell v MGN Ltd* [2004] UKHL 22.
[66] The applicant Murray, is the well known author of the 'Harry Potter' series of books, JK Rowling.
[67] *Murray v Express Newspapers PLC* [2007] EWHC 1908, 65.
[68] *Von Hannover v Germany* [2004] ECHR 294.
[69] *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, 14.

E Privacy Protection in Australia

Australian courts have in recent years acknowledged an action is available for an invasion of privacy. In *Grosse v Purvis*, the Court awarded compensatory and exemplary damages for an invasion of privacy.[70] The Court expressed the required elements of an action as follows:

(a) a deliberate act by the respondent;

(b) the act must intrude on the privacy of the complainant;

(c) the intrusion must be considered highly offensive to a reasonable person of ordinary sensibilities;

(d) the intrusion must result in a detriment to the complainant such as mental, physiological or emotional harm or distress.

The Court in *Grosse* acknowledged a defence of public interest would be available against an action for breach of privacy.

In the 2007 decision of *Doe v Australian Broadcasting Corporation* the Court considered an action for a breach of confidence, and an invasion of privacy. In that case, the defendant media organisation had breached the Judicial Proceedings Report Act 1958 (Victoria), which prohibited the publication of information which would lead to the identification of a victim of a sexual assault.[71] Hampel J upheld the claim of invasion of privacy. That decision was appealed, but settled prior to trial.

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[70] *Grosse v Purvis* (2003) Aust Torts Reports 81–706.

[71] *Doe v Australian Broadcasting Corporation* [2007] VCC 281.

F International instruments

1 International Covenant on Civil and Political Rights.

New Zealand has ratified the International Covenant on Civil and Political Rights ("ICCPR"). This covenant required that all member states introduce legislative and other protections to ensure citizens receive the protections ascribed in Article 17, as well as holding a duty to ensure the state does not interfere with the Article 17 rights.[72] Article 17 states:

> 1. No person shall be subjected to arbitrary or unlawful interferences with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.

Article 19(2) of the ICCPR confirms that everyone has the right to express and receive information:

> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

However, sub-article (3) confirms that such a right can be limited where to do so is reasonably necessary to protect the rights or reputation of others:

> (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> a) For respect of the rights or reputation of others;
>
> b) For the protection of national security or of public order (ordre public), or of public health .

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[72] United Nations Office of the High Commissioner for Human Rights, *General Comment No 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art 17)* (1988) 1.

VII PRESUMPTION OF INNOCENCE

Few principles in the criminal law are more fundamental than the presumption of innocence. Broadly speaking, this principle holds that a person is presumed to be innocent of the offence for which they are charged, until they are convicted. This principle is applicable both before a judgment is delivered, and following an acquittal or discharge. In the recent Court of Appeal judgment of *R v Wanhalla* [2007] 2 NZLR 573 [49], the court reaffirmed the position that a criminal trial proceeds from the beginning to the end, with the position that the accused is to be treated "as innocent until the Crown has proved his or her guilt".

An important value in a free society is the ability of citizens to be free from unjust invasion of the state. The Law Commission has recognised that merely being charged with an offence, invites doubt as to the persons innocence:[73]

> At the very least the citizen is charged with an offence, usually required to attend a court hearing, publicly described as a suspect, and turned into a defendant. The defendant may have been finger printed, and detained in a cell, possibly overnight, before the court hearing....The very reliability of the criminal process invites the public to doubt the innocence of anyone brought before the court. Name suppression is exceptional.

A not uncommon perception within the community is that merely because a person has been acquitted of their charge, does not mean to say they are innocent. That view is no doubt founded on the high standard required for a criminal conviction, of proof beyond reasonable doubt. It would be misguided to suggest that all those acquitted of a charge did not in fact have a hand in, or actually perpetrated the crime for which they escaped conviction. However it is equally misguided to consider that all those acquitted were culpable to any

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[73] *Compensating the wrongly convicted*, report 49, Law Commission, Wellington 1998.

degree. The fact remain that the person acquitted is innocent in the eyes of the law. As stated by the Canadian Supreme Court in *Grdic v R*:[74]

> ...as a matter of fundamental policy in the administration of the criminal law it must be accepted by the Crown in a subsequent criminal proceeding that an acquittal is the equivalent to a finding of innocence...to reach behind the acquittal, to qualify it, it is, in effect, to introduce the verdict of 'not proven', which is not, has never been and should not be part of our law.

A number of judgments have confirmed the importance of the presumption of innocence in the consideration as name suppression.[75] In *R v B*, the Court of Appeal observed that the presumption of innocence "while often determinative in bail cases, in suppression applications this interest has sometimes received limited attention."[76] In the High Court judgment of *J v Serious Fraud Office,* Baragwanath J allowed a request for suppression on the basis that the factors arguing for publication were not sufficient to displace the presumption of innocence.[77] In the recent case of *R v Sila*, Justice Fogarty held the presumption of innocence would succeed over other interests supporting the filming or photographing of a defendant during trial.[78] Starting from the position of open justice, Justice Fogarty held that the more important duty was to ensure that justice is done according to the law. In that case, his Honour held the guidelines developed relating to in-court filming and photography were wrong in law, in failing to adequately consider important considerations such as justice, which included the presumption of innocence.

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[74] *Grdic v* R (1985) 19 DLR (4th) 385, 389-390.
[75] For example, *Procter v* R [1997] 1 NZLR 295, *M v Police* (1991) 8 CRNZ 14, *S(1) and S(2) v Police* (1995) 12 CRNZ 714, R *v B* (CA 459/06) [2008] NZCA 130, William Young P, Robertson and Baragwanath JJ.
[76] R *v B*, ibid.
[77] *J v Serious Fraud Office* (10/October 2001), HC AK A126/01, Baragwanath J.
[78] R *v Sila* (6 May 2008) HC Christchurch CRI 2007-009-006120, Fogarty J.

A False Complaints

A proportion of accused persons, will themselves be the victim of a false complaint. Due to the very nature of false complaints, the true incidence is difficult to determine with accuracy, and will vary depending on the alleged offending. One area where there has been significant research on false complaints, is with sexual offending. Kanin of Purdue University researched confirmed false rape complaints in a small metropolitan community over a 9 year period.[79] Of a total of 109 rape complaints, 45 were confirmed to be false (41%). Kanin reports that the falseness of the allegations was not decided by the police, or by himself, rather it was "... declared false only because the complainant admitted they are false."

In an extensive report, the Home Office in the United Kingdom concluded that 8% of all alleged forcible rapes were determined to be unfounded upon investigation.[80] That figure did not include those cases where the alleged victim either withdrew the allegation, or subsequently refused to assist police with their enquires or prosecution.

This research suggests a significant rate of false complaints. Given the effect on a person accused of a crime, and reported to the public as being suspected of committing that crime, the potential for the complaint to be false must be given consideration when considering suppression of name.

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[79] Dr Eugene J. Kanin "False rape allegations" (1994) 23 1 *Archives of Sexual Behaviour*, 81, 12.
[80] United Kingdom Home Office Research "A gap or a chasm? Attrition in reported rape cases" - February 2005.

IIX IMPOSITION OF PENALTIES

In a criminal process there are broadly two type of penalties an accused may face. The primary penalty is that punishment imposed by the court such as imprisonment, fines, community work etc. Secondary penalties are those not expressly provided for punishment, but which may nevertheless have that result as an effect of the accused person. Secondary penalties include effects to a person's community standing, employment, family life, psychological distress (on the accused and their family) and loss of freedom pending the trial (such as a remand in custody, or imposition of restrictive bail conditions). While little issue could be taken with the role of the courts in imposing a primary penalty upon conviction, the question which must be considered is the extent to which society considers tolerable a secondary penalty. In *R v Sila*, Justice Fogherty considered that question and determined there is no basis for the court to impose any punishment on the accused prior to his or her conviction, which would result from publication of name, as they are to be considered innocent until any later conviction.[81] While that dictum was in relation to a request for filming and photography of the accused, his Honour nevertheless held:[82]

> 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 unjust punishment. Elsewhere, in the United Kingdom by law, and in Canada and Australia, such filming and photography does not happen.

His Honour further stated that:

> ...I must ensure that I do not impose a punishment on an accused person prior to conviction. I consider that the filming of an accused person in a Courtroom in the dock, or its equivalent can be a public humiliation. The accused person has a right to oppose it while presumed innocent, and he has done so here. To secure that justice be done it is prudent to prevent possible humiliation by such filming.

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[81] R *v Sila* (6 May 2008) HC Christchurch CRI 2007-009-006120, 19 Fogarty J.
[82] R *v Sila*, Ibid, 27.

The courts have recognised in other judgments that publication of a persons name prior to conviction has a punitive effect on a person who must be considered innocent. For example, in *M v Police*, Fisher J held:[83]

> One 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 offenders 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 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.

[83] *M v Police* (1991) 8 CRNZ 14, see also *S(1) and S(2) v Police* (1995) 12 CRNZ 714.

IX INTERESTS OF THE VICTIM AND PUBLIC

When discussing the issue of suppression of information in a criminal proceeding, consideration must also be made toward the interests of the victim and public.

A Interests of the Victim

Over the years, the processes and policies underpinning the criminal law has developed with increasing recognition of the interests of the victim.[84] The issue of name suppression of the accused is no different. The common law has developed (as discussed further below) to take into account the views of the victim when considering whether to grant an application for name suppression. The interests of victims is further recognised in statute. For example, section 138 of the CJA provides for automatic suppression of the name of the accused, and the victim in cases of sexual offending. In *R v W*, the Court of Appeal recognised that provision is entirely to protect the victims of sexual offending, as opposed to the accused.[85]

A difficulty arises in any discussion of name suppression, in that it is impossible to say generally what the position is of victims in the wider sense. For example, some victims prefer to have the name of the accused suppressed if there is a risk of their own identification, whereas some are satisfied for publication to occur. There appear to be wide ranging reasons for a victim to seek such publication.

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[84] During the hearing, it may be in issue whether the alleged 'victim' is in fact a 'victim'. In such cases the judgment will have the effect of making a finding of fact that the person is the victim in the alleged criminal conduct. Technically, prior to judgment it would be correct to refer to the 'victim' as the "alleged victim". However, for brevity, I will use to term 'victim' to refer to both 'alleged' and 'confirmed' victims.

[85] *R v W* [1998] 1 NZLR 35.

As discussed further below, section 140(4A) of the CJA requires the Court to consider the views of any victim, or the parent or guardian of a victim, when considering a request for permanent name suppression.

B Interests of the Public

One of the common arguments favouring publication of an accused name, is that such publication is in the public interest. This may include giving the public knowledge of who in the community is potentially a risk, so as to provide the ability to avoid such people.

X RELEVANT STATUTES

A *Criminal Justice Act 1985*

The primary legislation dealing with the suppression of information in a criminal proceeding, is the Criminal Justice Act 1985 ("CJA").[86] Prior to the introduction of the CJA, the courts had a more limited ability to suppress information under the Criminal Justice Act 1954, but did have the ability to suppress information under its inherent powers.[87] However, section 138(5) had the effect of codifying the law regarding suppression of information, and extinguishing any inherent powers previously exercised by the court. Section 138(5) holds:

> 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 and 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.

1 Section 138

Section 138 is entitled "power to clear court and forbid report of proceedings". Subsection 1 confirms the common law principle of openness of justice stating that:

> 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.

Subsection 2 provides for the suppression of information in stated types of cases, at the discretion of the court, where the court considers the effect on the

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[86] Appendix 1.

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

victim would effect their reputation, or be in the interest of justice or public morality to do so. Those types of cases include alleged sexual offending or extortion. This provision includes the ability to:

(a) forbid publication of any report or account or any part of the evidence adduced, or of the submissions made;

(b) make an order forbidding the publication of name of any witness, or witnesses, or any name or particulars likely to lead to the identification of the witness(s);

(c) exclude persons from the hearings (not including the informant, police, the defendant, counsel engaged in the proceeding and officers of the court (with some limitations)).

However, subsection 3 holds that the subsection 2 exclusions should not be applied to exclude accredited news media, except in cases involving the security and defence of New Zealand.

Penalties for a breach of section 138 are set out at subsections 7 and 8, to include a fine not exceeding $1,000, or the penalty applied for a contempt of court for any evasion or attempted evasion of section 138(2)(c) (which relates to an exclusion of persons from a proceeding).

2 Section 139

Section 139 is entitled "prohibition against publication of names in specified sexual cases".[88] This provision provides for an automatic prohibition against publication of names in specified sexual cases. Importantly, there is no need for any application to be made to the court for a suppression to become

[88] See appendix 1.

automatically effective.[89]. As noted in subsection 1AA, the purpose of section 139 is to protect persons upon whom an offence has been or is alleged to have been committed. The primary provision is subsection 1, which holds:

> No person shall publish, in any report or account relating to any proceeding commenced in any court in respect of an offence against any of sections 128 to 142A of the Crimes Act 1961, [or in respect of an offence against section 144A of that Act,] the name of any person upon or with whom the offence has been or is alleged to have been committed, or any name or particulars likely to lead to the identification of that person, unless –
>
> (a) That person is of or over the age of 16 years; and
>
> (b) The court, by order, permits such publication

In terms of 'publication of the name of the offender', that means an automatic prohibition on publication where publication would "likely to lead to the identification" of the victim or alleged victim. While the standard of "likely", is subjective, the courts have confirmed that is made out where there is an appreciable risk that publication might lead to the identification of the victim.[90] The courts have confirmed that if there is any doubt as to the likelihood of identification, the courts should make an order under section 139.[91] In *A v Hunt*, the High Court indicated the bar was not set particularly high, and would include publication about details which would provide information to enable aspects of their identity to be disclosed.[92] As confirmed by Cooke P in *R v Liddell*:[93]

> We stress that by the automatic operation of the ban enacted by Parliament [section 139(2)], and not by any order of the Court, the media are not free to report the appellant's name or any other particulars if the report would be likely to lead to the identification of a victim. Compare *Ex p Godwin* [1992] QB 190; [1991] 3 All ER 818; and contrast s139A(2) of the New Zealand Act. We draw attention to this as the media will have to take it into account in preparing any report.

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[89] *R v W* [1998] 1 NZLR 35.
[90] *R v W*, ibid.
[91] *Procter v* R [1997] 1 NZLR 295, *R v W*, ibid.
[92] *A v Hunt* (17 May 2006) HC WN CIV-2003-485-2553, Wild J.
[93] *R v Liddell* [1995] 1 NZLR 538 (CA).

Subsection 2 provides an express prohibition against publication of the name of the offender or alleged offender if the charge is brought under sections 130 and 131 of the Crimes Act 1961, being incest or sexual conduct with a dependent family member, if publication is likely to lead to the accused identification.

3 Section 140

Section 140 of the CJA is entitled "court may prohibit publication of names", and as suggested in its title, expressly provides for the prohibition of publication of names in general.[94] This provision provides wide scope for the court to prohibit the names of any person accused or convicted of a crime or connected to a proceeding. This includes not only the persons name, but their occupation and address, and any particulars likely to lead to their identification.

Subsection 2 allows the court to expressly provide name suppression for a limited time, or on a permanent basis if the court does not set any time limit.

Subsection 3 recognises that often a suppression order will be granted pending an appeal on the courts decision not to grant a suppression application. This provision holds that the suppression order will automatically cease on determination of the appeal, or on the expiry on the time frame allowed to seek an appeal.

Subsection 4 holds that the court may grant a further application for name suppression, at the expiry of the previous order. Subsection 4A was inserted in 2002 as a result of s53 of the Victims Rights Act 2002. This new provision holds that when the Court is considering a request for permanent name suppression, that consideration must be had for the views of the victim, or the parent or guardian of the victim, conveyed in accordance with s28 of the Victims' Rights Act 2002.

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

B *New Zealand Bill of Rights Act 1990*

1 *Section 14*

Section 14 of the New Zealand Bill of Rights Act 1990 relates to freedom of expression, and holds:

> 14 Freedom of expression
>
> 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.

In *Lewis v Wilson & Horton,* Elias CJ confirmed that a judge must consider whether any request to grant a request for suppression, would be a reasonable limitation on the s14 right to freedom of expression:[95]

> 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 for in 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.

2 *Section 25*

Section 25 of the New Zealand Bill of Rights Act 1990 holds that a person charged with an offence has the right to be presumed innocent until proven guilty according to the law, and has the right to a "fair and public hearing

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

by an independent and impartial court."[96] Some commentators have opined that this section can be interpreted by using the words "and public hearing", to support that proceedings must be open. For example, Burrows states:[97]

> In the first place, the hearing must take place in open court, and members of the public (including reporters) are entitled as of right to be present. The New Zealand Bill of Rights Act 1990 reaffirms this principle; it provides that a person charged with an offence has a right to 'a fair *and public* hearing by an independent and impartial court.

In the author's opinion, it is not correct to say that section 25 requires the proceeding to be held in the open. Section 25 is a provision centred on the protection of the accused. Typically personal rights are not mandatory for the person, and so the person can if they so chose elect not to avail themselves of any right available.[98] For example, section 23(4) of the New Zealand Bill of Rights Act 1990 holds that "[e]veryone who is ...arrested...or detained...shall have the right to refrain from making any statement...". Accordingly, any person arrested or detained may should they wish, avail themselves of the right to refrain from making a statement to Police. However they could equally decline the benefit of such a right, and decide to make a statement. In the context of section 25, the accused could, in theory at least, elect not to have a 'public hearing' as would otherwise be required as the result of section 25.

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[96] A similar provision is found in the International Convention on Civil and Political Rights ("ICCPR") and the Universal Declaration of Human Rights. Article 14(1) of the ICCPR states "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

[97] Burrows (ed) *Media Law In New Zealand* (4th ed, Oxford University Press, Auckland) 1999.

[98] *Johnson v Morton* [1980] AC37.

XI APPLICATIONS FOR THE GRANT AND REVOCATION OF NAME SUPPRESSION

The starting point in any application for name suppression is always the importance of freedom of expression and the principle of open justice.[99] In the leading judgment of *A-G v Leveller Magazine Ltd*, Lord Diplock stated that:[100]

> The application of this principle of open justice has two aspects: as 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.

A Time for Application

An application for suppression of name may be made either prior to or during a hearing. In the case of *Kingi v Police*, an application for suppression was granted prior to the preliminary hearing, which had the effect of being made outside of an open court proceeding.[101]

B Automatic Suppression in Certain Cases

As noted above, section 139 of the CJA and section 375A of the Crimes Act 1961 provide for automatic name suppression in certain specified cases of sexual offending. In such cases, no application needs to be made to the court before an effective suppression would exist.

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[99] *R v Liddell* [1995] 1 NZLR 538, 546 – 547, *R v B* (CA 459/06) [2008] NZCA 130, William Young P, Robertson and Baragwanath JJ.

[100] *Attorney - General v Leveller Magazine Ltd* [1979] AC 440, 450.

[101] *Kingi v Police* (6 December 2002), HC Rotorua AP 99/02, Nicholson J.

C *Revoking Name Suppression at the Request of the Victim*

Section 139 holds that an alleged victim may apply to the court for an order that either their name (ss 1A), or the name of the offender (ss 2A) be published, and that the court must make such an order, providing the court is satisfied that the applicant understands the nature and effect of their request. Such a request must be formally made to the court, given the potential for damage to the victim(s) of the offending. The Court will almost certainly require evidence to demonstrate the applicant fully understands the consequences of the application.[102]

There is the issue of whether a person who is the subject of a suppression order, could consent directly to the media to allow the publication of the persons name. There is a general rule that a person may waive a statutory protection, passed to protect people in the category of persons concerned.[103] However, as noted in Burrows and Cheer, the media may be unable to avail themselves of protection where the publication is of automatically suppressed names in a criminal case, as consent is seldom a defence to a criminal charge, as would be the case for a breach of a suppression order.[104]

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[102] *X v Police* (12 May 2006), HC AK CRI-2005-404-430, Harrison J, *Waikato and King Country Press Ltd v* R [1997] DCR 292.
[103] *Johnson v Morton* [1980] AC37.
[104] Burrows (ed) *Media Law In New Zealand* (4th ed, Oxford University Press, Auckland, 1999) 242.

XII CONSIDERATIONS MADE BY THE COURT WHEN CONSIDERING NAME SUPPRESSION

It is a well settled law, that save for certain specific exceptions, criminal proceedings in a New Zealand court will be open to the public. Certainly that is the starting point for any consideration of suppression of information.[105] With an application for name suppression, the onus sits with the applicant to show that the court should allow a departure away from the principle of open justice.[106] A review of New Zealand judgments demonstrates that the courts have consistently refused to define set criteria which must exist in order to receive name suppression. For example, in *R v Liddell*, the court held it would be "inappropriate for this Court to lay down any fettering code."[107]

With any application for name suppression, the courts will balance the principle of open justice with the interests of justice in that particular case. The result will often be a tension between the ability of the media to freely report on a proceeding and the public's ability to receive that information, against the accused's right to a fair trial. Where any appreciable risk to a fair trial exists, the courts will typically grant a suppression order.[108]

In *R v Liddell*, Cooke P confirmed that the grant of an application for name suppression is a discretionary matter for the Court, and one which should not be lightly disturbed. The President states:

> ...It has to be remembered also that he was exercising a discretionary jurisdiction. Although he took comfort in the knowledge that his decisions could be reviewed on appeal, this Court does not disturb such decisions unless they are based on some wrong principle or otherwise shown sufficiently clearly to be wrong.

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[105] *Serious Fraud Office v Singh* (28 August 2007), HC Auckland CRI-2007-404-219, Courtney J, *Victim X v Television New Zealand Ltd* [2003] 3 NZLR 220, *R v B (CA 459/06) [2008] NZCA 130 William Young P, Robertson and Baragwanath JJ.*

[106] *Victim X*, ibid.

[107] *R v Liddell* [1995] 1 NZLR 538 (CA). *See also March v Police* (12 July 1979) SC Napier M 30/79.

[108] *R v B*, ibid, *Solicitor –General v Wellington Newspapers Ltd* [1995] 1 NZLR 45, *Gisborne Herald Co Ltd v Solicitor – General* [1995] 3 NZLR 563.

While the Court will consider the opinion of the police when considering a request for name suppression, the opinion of the police will not be a precondition to the exercise of the jurisdiction of the court.[109] Where an application for suppression of information in the interests of justice is made, the applicant must show it is likely the administration of justice would be effected through the publication of the information, or openness of the court proceeding. An example would be where there is a realistic likelihood the prospects of a fair trial would be affected if information such as the name of the accused was published.

A Onus of Proof

Where any application for name suppression is made, the onus to prove it should be granted sits with the applicant to make their case "strictly and bring it up to the standard which the underlying principle requires".[110] Befitting the criminal standard of proof, the courts have confirmed that the onus on the applicant is "a heavy one".[111]

B Factors the Court Consider

While the courts have declined to set any criteria for granting of name suppression, the following factors are typically considered by the court.

1 Stage of proceeding

An important factor the court will consider is the stage of the proceeding. This factor was discussed at length in *R v B*.[112] The Court of Appeal confirmed that the bar is not set high in order to obtain a grant of name suppression prior to a trial. The Court held that "Pre-trial publicity may be ill-informed and perhaps

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[109] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546.
[110] *R v Paterson* [1992] 1 NZLR 45.
[111] *Police v O'Connor* [1992] 1 NZLR 87.
[112] *R v B* (CA 459/06) [2008] NZCA 130 William Young P, Robertson and Baragwanath JJ.

unjustified...There is the natural justice consideration that the accused has not had an opportunity to present the defence case." By the time the case gets to trial, "suppression ... is uncommon because the accused has the opportunity to place the defence contentions before the court and therefore those present in court or who read reports of the proceedings". Following trial, it would be "... rare for suppression to be ordered save in cases where that is required to protect a person other than the person convicted." Similarly, the Law Commission in their publication *Delivering Justice for all*, held that the considerations for name suppression were dependent on the stage of the proceeding.[113] The Commission proposed there should be a general prohibition on publication of name until the substance of a charge is heard before the court.

2 *Seriousness of the charges*

The courts have recognised that when the charges are truly minor, even when the person is convicted, that there is a stronger justification for a departure from the open justice principle. This is particularly where the potential harm to the accused from publication of name will outweigh any public interest in publication.[114] As stated by Cooke P in *R v Liddell*:[115]

> ...a case of acquittal, or even conviction of a truly trivial charge, 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...

The courts have held that defendants in sexual offending cases are unlikely to be granted name suppression (save for the statutory prohibitions).[116]

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[113] New Zealand Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals* - NZLC R 85 March 2004.
[114] *M v Police* (1991) 8 CRNZ 14, *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, *R v S* (21 November 1985), CA 116/85.
[115] R *v Liddell* [1995] 1 NZLR 538 (CA).
[116] *Procter v* R [1997] 1 NZLR 295.

3 *Previous convictions and acceptance of wrong doing*

The lack of previous convictions and acknowledgement of wrongdoing will not necessarily be an important factor in deciding whether to grant suppression. These circumstances are described as "commonplace factors".[117]

4 *Driving While Intoxicated*

There is a statutory prohibition of suppression of names for drink driving offences, except in extraordinary situations.[118]

5 *Acquittal or discharge*

There is no automatic presumption in favour of name suppression when the accused is acquitted, however the fact of an acquittal will significantly argue for an ultimate suppression of name.[119] However, even following acquittal, the courts have recognised there may still be a legitimate interest in the public to know the name of the acquitted person.[120] In *Lewis v Wilson & Horton*, the Court of Appeal upheld the High Courts decision which allowed for the publication of the accused name following a discharge without conviction, after a guilty plea. The charge in that case related to importing drugs (cannabis plant and resin).[121]

In *R v H*, Baragwanath J granted name suppression where the court determined that on the evidence the accused had no charge to answer. The Court was satisfied it would not be acceptable that a person who received a judgment under s347 of the Crimes Act 1961 (power to discharge an accused), should then

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[117] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546.
[118] Land Transport Act 1962, s61.
[119] R *v Liddell* [1995] 1 NZLR 538 (CA).
[120] R *v Dalzell* (1991) 63 CCC (3d) 134, R *v Liddell* [1995] 1 NZLR 538 (CA).
[121] *Lewis v Wilson and Horton*, ibid.

also be faced with negative inference which might be reached of the accused, given the charge was of serious sexual offending.

6 Age of the accused

The age of the accused will be an important factor when considering an application for name suppression. In *TV 3 v R*, the accused was 15 year of age at trial, and 14 years at the time of the offending, Justice Winkelmann observed, referring to his earlier oral decision:[122]

> I referred in detail to certain international instruments such as the Convention on the Rights of the Child which imposed upon the state obligations to respect the privacy and dignity of the child and also to promote the child's reintegration and rehabilitation. Having weighed those matters, and having heard the evidence of Dr Immelman, I…[granted name suppression] at least prior to the verdict, to preserve the potential for rehabilitation and reintegration.

Article 8 of the United Nations Standard Minimum Rules for the administration of Juvenile Justice ("the Beijing Rules"), hold:

> 8 Protection of Privacy
>
> 8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.
>
> 8.2 In principle, no information that may lead to the identification of a juvenile offender should be published.

Furthermore, Article 40 of the United Nations Convention on the Rights of the Child provides that states parties shall ensure that every child alleged or accused of infringing the penal law should have minimum guarantees, including

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[122] *TV3 v R* (7 July 2006) HC AK CRI 2005-92-14652, 6.

the right "to have his or her privacy fully respected at all stages of the proceedings".

For any proceeding in the Youth Court, there is an automatic prohibition against publication of name as a result of section 438 of the Children, Young Persons, and Their Families Act 1989. However, that prohibition does not apply if the young person is committed for trial in the District or High Court.[123] In such cases, the accused will need to apply for name suppression in the same manner as would an adult accused.

7 *Impact on the accused*

When considering a request for name suppression, the courts will consider the impact of publication on the accused, although this consideration has significant limitations. Generally, this consideration will be limited to cases where:

(1) publication would potentially affect the ability of the accused to receive a fair trial, and extents to situations where publication would limit the ability of the accused to defend themselves;[124]

(2) result in a real risk the accused will self harm prior to the trial;

(3) significantly affect the physical or mental health of the accused. The standard required to show a risk must be more than a possibility. In *Jacks v Hastings District Court*, the court stated the potential effect must be "exceptional";[125]

(4) where the effects to the accused will be out of all proportion to the seriousness of the offending, which might include factors such as

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[123] R *v Hansen* (20 March 2006), CA24/86.
[124] R *v W (no 2)* (2004) 21 CRNZ 937 (CA).
[125] *Jacks v Hastings District Court* [2005] NZAR 736 (CA).

effect upon financial and professional interests. The effect must be sufficient to displace the presumption favouring publication;[126]

(5) publication would materially reduce the effects of rehabilitation.[127]

In *R v B*, the Court of Appeal held that human dignity of the accused was a factor to be considered:[128]

> An overlapping public interest, referred to in Proctor, is that of human dignity, which has emerged as a fundamental human right and is increasingly protected by the evolving right to privacy. This latter has been recognised by Parliament in the Privacy Act 1993 and by this court as an emerging tort: Hosking v Runting…

In *R v Sila*, Justice Fogherty recognised there is the potential for adverse effects on the accused if acquitted, merely by publication of photographs or film images of the them:[129]

> ...there is a basis in this case for Mr Cook's argument that if Mr Sila become recognisable by reason of his picture being broadcast or published he may, if acquitted, nonetheless be the subject of attacks on his person because of the context of tragedy which surrounds this case.

8 Impact on the accused's family

The courts generally place little weight on the effect to the accused family when considering a request for suppression. In *W v Police*, the court held there was always significant effects on an accused' family when the charges relate to serious offending. For that reason, the court held the effect of the family was of

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[126] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546
[127] *R v B* (21 April 2005) CA4/05.
[128] *R v B* (CA 459/06) [2008] NZCA 130, William Young P, Robertson and Baragwanath JJ.
[129] *R v Sila* (6 May 2008) HC Christchurch CRI 2007-009-006120, 30 Fogarty J.

little moment when considering an individual application for suppression.[130] Similarly in the earlier case of *R v Liddell*, the court held that "when a conviction is for serious crime it can only be very rarely that the interests of the offenders family will justify an order suppressing disclosure of his identity".[131] However, that Court nevertheless maintained a prohibition on publication of the name, address and occupation of Mr Liddell's wife and sons. The Court state:

> Publication of the accused's identity will necessarily lead some members of the public to identify also his wife and sons. We see no reason, however, why these innocent persons, although they are 'connected with the proceedings' as the Judge held, should not receive such protection as the statute enables.

However, in some other cases, the courts have allowed suppression of name when satisfied the effect on family members justified a departure from the principle of open justice.[132]

9 *Impact on employer*

Generally the courts have been receptive toward considering the effect of publication of an accused name on an employer.[133] In *R v Ka* the court granted an application of suppression to a medical doctor charged with sexual offending, on the basis that publication would unreasonably affect the medical centre where the he worked as a locum.[134] The court accepted that publication would affect the confidence of patients who attended that medical centre.

The Court must be provided with evidence to show a likely harm to the employer, in order for the interests of the employer to be sufficient to displace the presumption on freedom of reporting.[135]

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[130] *W v Police* [1997] 2 NZLR 17.
[131] R *v Liddell* [1995] 1 NZLR 538 (CA).
[132] *S(1) and S(2) v Police* (1995) 12 CRNZ 714.
[133] *T v Police* (29 November 1991) HC AK AP282/91, Tompkins J.
[134] R *v Ka* (24 February 1999) HC AK T990076, Smellie J.
[135] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546.

10 Impact on other accused

The courts will typically grant suppression where the publication of an offenders name will potentially jeopardise the ability to conduct a fair trial for co-accused.

11 Providing information to the police

In cases where an accused has provided information to the police which may result in conviction or investigation of others, provision of name suppression may be required to ensure the safety of the accused.[136]

12 Likelihood of other victims coming forward

A commonly stated reason for restricting suppression of name, is that naming the offender may result in other victims coming forward. In *R v Liddell*, the Court of Appeal noted the prisoner was a proved paedophile.[137] The Court was not satisfied the High Court had applied the appropriate considerations with regard to encouraging other victims to come forward. The High Court Judge held he could not "properly and fairly take that speculative possibility into account against Mr L on this occasion." In the Court of Appeal, Cooke P stated:

> In the case of a proved paedophile, and especially one with two proved periods of offending, the risk that further offending may have occurred is regrettably more than an insignificant possibility. In this case there are factors which underline the risk. While it would be wholly wrong to assume further offending, it cannot be overlooked that the accused held a series of posts bringing him close to young people…
>
> …The Deputy Solicitor-General informed the Court that two further alleged victims had come forward as a result of publicity; there complaints were being investigated by the police.

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[136] *Broadcasting Corporation of NZ v A-G* [1982] 1 NZLR 120.
[137] *R v Liddell* [1995] 1 NZLR 538 (CA).

13 *Futility of order*

The courts have been reluctant to refuse an application merely on the proposed futility of granting a suppression order, on the basis that the information may be published either within New Zealand or internationally.[138] However, where the information is already in the public domain, "it will not generally be appropriate to grant name suppression".[139]

14 *Community standing, celebrities or professionals*

The courts will place little weight on the position or celebrity of a person within the community, when considering requests for name suppression. This category of accused still needs to show that the effect of publication is likely to extend beyond what is reasonable in such cases. In *Abbott v Wallace*, a case involving a Police officer charged privately with murder, and *A Defendant v Police,* a prosecution of a District Court Judge charged with sexual offending, the courts declined to grant suppression.[140]

When considering whether to grant suppression, the courts will generally not grant the application where the effect of suppression would be an ordinary consequence of the offending. In the Court of Appeal decision of *Proctor v R*, the court declined a request for name suppression from a surgeon. The Court stated that "one must be careful to avoid creating a special echelon of privileged persons in the community who will enjoy suppression where there less fortunate compatriots would not".[141] In *Lewis v Wilson & Horton*, the court held:[142]

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

[139] *Lewis v Wilson & Horton Ltd*, ibid, *A-G for UK v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (CA). See also *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716.

[140] *Abbott v Wallace* [2002] NZAR 95, *'A Defendant' v Police* (1997) 14 CRNZ 579.

[141] *Proctor v* R [1997] 1 NZLR 295 (CA).

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

> The standing of the appellant as 'an extraordinarily successful businessman, community leader and philanthropist' was not grounds for suppressing his name in the absence of evidence of special harm to him through publicity. No harm to the appellant was suggested beyond the submission that his standing would make media interest in him 'undue'. That is tantamount to a submission that successful or prominent members of the community should receive name suppression because there may be media interest in such people...In the absence of identified harm from publicity which clearly extends beyond what is normal in such cases, the presumption of public entitlement to the information prevails. Any other approach risks creating a privilege for those who are prominent which is not available to others in the community and imposing censorship on information according to the Court's perception of its value.

C Interim and Permanent Orders

It is open for the court to grant either interim or permanent name suppression. Interim orders are typically granted by the court until the applicant enters a plea, or until the conclusion of a preliminary hearing or the conclusion of the trial. It is uncommon for the court to award permanent name suppression prior to the conclusion of a proceeding.

It is common for the court to consider applications differently depending on the phase of the proceeding. For example, in *TV3 v R* the court declined an application from TV3 to lift name suppression from the accused in a pre-trial application, but invited the media to further apply at the conclusion of the hearing.[143] In cases where the court grants an application for name suppression, the order will be permanent unless the court expressly states the order was an interim one.[144]

In cases where a registrar adjourns a hearing, the accused can request a grant of name suppression from the registrar. Any grant is always interim for a maximum of 28 days.[145] However, a registrar may grant an application for permanent name suppression in cases where a Police diversion has been

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[143] *TV3 v R* (7 July 2006) HC AK CRI 2005-92-14652, 3.
[144] *Victim X v TVNZ Ltd* (2003) 20 CRNZ 194.
[145] Summary Proceedings Act 1957, s46(2) and (3).

completed, and the informant seeks the leave of the court to withdraw the charge.[146]

[146] Summary Proceedings Act 1957, s36(1A) and (1B).

XIII BREACHES OF SUPPRESION ORDERS

It is an offence to publish any suppressed information within an order from the court, or from the effect of automatic name suppression. It is also an offence to evade or attempt to evade a suppression order on publication. In order to breach a suppression order, there must be a public disclosure of the suppressed material.[147] It is permissible for the media to breach a suppression order, when the media have been requested by the Police to publish the name or identifying particulars of a person who is the subject of a suppression order, when that person has escaped from custody, and the purpose of the publication is to attempt to recapture that person.[148] In such a case, the media does not require the authority of the court.

Burrows suggests it is an open question as to whether the court could provide a penalty for a breach in excess of that allowed in statute under the grounds of a contempt of court, where the case is of a flagrant and intentional disobedience of the court,.[149]

While the case law in New Zealand is limited, Williams J in *C v Wilson & Horto*n indicated that publishing an accused's name before their first appearance, may be a contempt of court, as it circumvents the ability of the court to grant a request of name suppression.[150] In that case, the court granted an interim injunction to stop the publication of the name of a man under investigation by the serious fraud office.

A Strict Liability

A breach of a name suppression order is a strict liability offence. The offence is made out on proof of publication of the suppressed information. Once publication is demonstrated, the onus then falls on the person accused of the

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[147] *Solicitor-General v Smith* [2004] 2 NZLR 540.
[148] Criminal Justice Act 1985, s141.
[149] Burrows (ed) *Media Law In New Zealand* (4th ed, Oxford University Press, Auckland,1999) 248.
[150] *C v Wilson and Horton Ltd* (27 May 1992) HC AK CP 765/92.

breach, to show that they took reasonable care in the circumstances, so to have avoided the breach.[151] If the person meets that onus, then there is a complete absence of fault.[152]

B Publication

Publication occurs by disclosing and bringing suppressed information in to the public domain.[153] "Publication" need not only be in the news media, and can include distribution of the suppressed information in other forms such as in pamphlets, or via the internet.[154] [155]

C Penalty

The penalty for breach of a suppression order under the CJA is a maximum fine of $1000. Some commentators have opined that the penalty is too low to act as a real deterrent, particularly to a large media company. The argument is that the business may obtain more in revenue as a direct result of publication, than the maximum penalty under the Act. It has been the practice of the Crown when bringing a prosecution for the breach of a suppression order, to name the media organisation as the defendant, rather than individuals within that organisation. However, that is not to say that individual reporters or editors could not be prosecuted.

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[151] *Karam v Solicitor-General* (20 August 1999) HC AK AP50/98 Gendall J.
[152] *Millar v MOT* [1986] 1 NZLR 660.
[153] *Solicitor-General v Smith* [2004] 2 NZLR 540.
[154] *Sullivan v Hamel-Green* [1970] VR 156.
[155] *Re X (A victim: name suppression)* [2002] NZAR 938.

XIV APPEALS AGAINST NAME SUPPRESSION DECISIONS

Appeals from decisions of the District Court regarding suppression of name in the summary jurisdiction can be made in the High Court, pursuant to section 115 of the Summary Proceedings Act 1957. District Court decisions made during a trial can also be appealed to the High Court in terms of section 28E(2B) of the District Courts Act 1947. With regard to matters before the High Court, leave to appeal a decision from that court is made under section 379A(1)(BA). Following the trial, the application is made under section 383(1)(b) of the Crimes Act 1961.

Where a party indicates to the District Court that they are likely to appeal its decision to decline a suppression order, an interim order it typically granted by the District Court Judge under section 115C(2) of the Summary Proceeding Act 1957, to protect the position of the applicant, pending any appeal to the High Court. Because the grant of a suppression order is a discretionary matter for the court, to succeed in an appeal, the appellant court must accept that either the lower court acted on some wrong legal principle, or was clearly wrong.[156]

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[156] *Victim X v Television New Zealand Ltd* [2003] 3 NZLR 220, *R v Liddell* [1995] 1 NZLR 538 (CA).

XVI AUTOMATIC PRE-JUDGMENT NAME SUPPRESSION

In the author's opinion, the law should be developed toward a system where the default position with all criminal charges is automatic pre-judgment name suppression. As noted above, automatic name suppression is already a feature of the New Zealand criminal justice system, and can be seen other jurisdictions.[157] While the starting position should be automatic suppression of an accused's name, any development of the law should also allow an application to be made to the court for release of the accused name at the discretion of the court. It is likely situations would arise where sound reasons would exist for publishing an accused's name. Those might include for example, situations where there is evidence of other victims within the community, and publishing the name of the accused may encourage other victims to come forward.

By having the suppression automatic only to the point of judgment, that then gives the court the opportunity on giving its judgment, to either allow the accused to be named, or to maintain a suppression if the circumstances dictate.

[157] For example, cases where the accused is a child, or an automatic suppression applied under section 138 of the CJA.

XVI ARGUMENTS FOR PRE-JUDGMENT NAME SUPPRESSION

The issue as to the extent any information should be suppressed within the courts, has been a question for as long as the courts have been open to the public and media. The issues to be considered are largely not new, but there are contemporary circumstances which must be considered which result from living in a modern age, with differing imperatives in today's society.

As discussed above, the courts have recognised there is generally three broad timeframes in a criminal prosecution where the considerations for name suppression vary. These are before the first appearance, between the first appearance and judgment, and following a judgment. Given this paper relates to pre-judgment name suppression, the following discussion will centre on the first and second timeframes. However, much of the discussion will be relevant for the third timeframe, being post judgment.

A The Fair Trial Requirement

It is clear the most important and consistent priority for the court when considering a request for suppression, is the requirement to ensure a fair trial. The requirement to ensure a fair trial, is an imperative for the benefit of all parties, but most importantly the accused. This requirement can be seen in the many rules and laws regarding the conduct of criminal trials. While some rules and laws are in place to protect victims, the vast majority are in place to ensure the accused receives a fair trial. [158] The primary aim of a trial is to bring the alleged offender to justice – if they are guilty. In western societies this is typically achieved by bringing the person before the court, and having an appropriate penalty imposed where required. Accordingly, while a trial will have the benefit of achieving some catharsis for the victim and society, it is primarily centred on the offender.

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[158] For example, the rules surrounding the giving of evidence for victims of sexual offending, and particularly their examination.

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available to allow the accused to avoid the detrimental effects from conviction and sentence in appropriate cases. Publication of a persons name seriously affects the efficacy of a diversion for the accused. Ensuring all names are suppressed, will ensure that all accused have the prospects of the full range of outcomes from the court.

B Publication is a penalty to an innocent person

One of the longest standing principles in the criminal law, is that the accused is innocent until proven guilty. As was recognised in the Court of Appeal judgment of *R v B*, the presumption of innocence is often an important factor in an application for bail, but is somewhat ignored when considering a request for suppression of name. It is simply wrong to suggest that when the Police make a decision to charge a person, they are always correct. There are frequent reports of cases where a person is subsequently proven not to have committed the crime for which they were charged. The Legal Services Agency report that in the Auckland and Manukau District Courts for example, only 76% of defendants were convicted. The remainder of the charges resulted in either withdrawal, dismissal or acquittal. In a practical sense, this means that in 24% of cases the person should be considered innocent.

Until the person is found guilty of the charge they are innocent, and must in law be considered as such. The author suggests there would be few cases where the publication of an accused name, would not be a penalty for that person. The penalty may result from the direct humiliation to the accused from their name being associated with offending, or the penalty may be secondary, such as the effects on the persons business or career. In the eyes of the law, a person acquitted of a charge must be released free of penalty. However in practice, the person may be acquitted only to face a continued penalty from society, which cannot be just.

C *Effect of Technology*

Developments in technology, and particularly the internet, mean a person may be affected by a charge longer than they would have in earlier times. Prior to the availability of the internet, a person's name being associated with a charge may only last as long as the general memory of the community, and would dissipate with the mists of time and be forgotten. For members of the public, searching court records or archived newspapers for a particular person would be a difficulty task, and as such rarely occur. However, with the internet, we can readily access large amounts of information on a person from a wide range of sources, which may have been archived back many years. Therefore the effect on a person from a charge, even when found not guilty, may potentially be with the person for their life-time.

D *Reduced invasion on the accused*

A fundamental principle in a free society is the ability of citizens to be free from unjust invasion of the state. Considerable invasion can occur simply as the result of being charged with an offence under the criminal law. As observed by the Law Commission:[159]

> At the very least the citizen is charged with an offence, usually required to attend a court hearing, publicly described as a suspect, and turned into a defendant. The defendant may have been finger printed, and detained in a cell, possibly overnight, before the court hearing....The very reliability of the criminal process invites the public to doubt the innocence of anyone brought before the court. Name suppression is exceptional.

The publication of a person's name and the details of their charge would, the author suggests, be likely to have a significant effect on those named. Furthermore, those named persons are likely to be perceived negatively within the community. Notwithstanding any subsequent findings of the court, the

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[159] Law Commission *Compensating the wrongly convicted* report 49, Law Commission, Wellington 1998.

person will be perceived as guilty by a proportion of society, based merely on having been charged. Automatic suppression of name will go some way to limit the invasion of the person by the state.

E Administrative Efficiency

An application for suppression of name, or appealing a courts decision regarding a suppression has a cost. The costs relate to the expense for counsel and the court, as well as the consumption of precious court time. Providing for automatic suppression of name may reduce the cost associated with the current system. However, if there is provision to apply to have a name released (as I have proposed), that would result in a cost, which would depend on the frequency of applications.

F Greater Certainty

Under the current name suppression system, it can be uncertain whether any particular accused person has a name suppression order. That is because there is no register of suppression orders, and the order is typically given orally in court. A difficulty for the media arises when the reporter leaves court prior to the conclusion of the hearing day, and may miss an order being given. Furthermore, the media have reported difficulties in finding whether a name suppression order has been granted in any particular case.[160]

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[160] As stated by the announcer on Radio New Zealand, 'Morning Report', 17 September 2008.

XV ARGUMENTS AGAINST PRE-JUDGMENT NAME SUPPRESSION

Just as there are arguments for more liberal application of suppression orders, so too there are arguments against more liberalisation. Some of the more significant arguments are discussed as follows:

A Encroachment on the right to freedom of speech

A significant and longstanding right is the right to freedom of speech. Closely aligned to the right to impart information, is the right to receive information. In the context of a granted suppression order, these rights are encroached in that the media (typically) are restricted in their ability to impart information, and the public are restricted in their ability to receive that information. Many would argue that society should resile against any further inroads on the import right to freedom of speech.

It must however be recognised that any restriction on publication is limited to the extent of the suppression order from the court, or the automatic suppression that results from statutory restrictions. With regard to name suppression, these restrictions are normally limited to the persons name, and identifying particulars. Importantly, the media typically remain free to report on any other details of the crime, charge or hearing. It must also be recognised that under the current criminal justice process, there are already frequent cases where name suppression is granted, or an accused will receive an automatic statutory name suppression.

The question should be considered that, even if there is a restriction of publication of name prior to a judgment, is that a significant limitation on the right to freedom of speech. As noted above, the media are likely to remain able to publish wide ranging information in relation to the crime, charge or hearing, so perhaps the answer is 'no'.

B Protection of the Public

A frequently cited reason to avoid name suppression is that publication of the persons name will allow the public to be protected from someone who may be a danger to the public. When the public is made aware of a possible criminal within their community (given that the person has been charged with an offence), individuals can make up their own minds as to whether they avoid contact with that person. Similarly, it might be argued that by naming the accused, even if they are acquitted of the crime, or the charge is withdrawn, that the public can still choose to avoid the person 'in case they are actually guilty'.

One of the flaws with that argument, is that typically when Police consider a person is a danger to the community, they will either oppose bail so the person remains in custody, or seek the imposition of bail conditions so as to limit the persons risk of any continued potential offending. For example, where a person has a history of committing crimes under the influence of alcohol, the Police would normally seek a bail condition that that the person does not consume alcohol while on bail.

Furthermore, in a proportion of cases of sexual offending, the accused's name will be suppressed where there is any risk of identification of the alleged victim. In those cases community risk cannot be lowered by publication of name, but is often limited with bail conditions (such as not associating with the victim, or children etc).

C Interests of the Public

Some would argue against suppression of names, because society has an inherent desire to know what is going on, especially if the accused is of public interest. In these situations, the desire to know who is before the courts may not be for functioning of our society, but more from an interest in 'salacious' news stories.

D Interests of the Media

In the author's opinion, any more liberal application of name suppression may directly affect the business of the media. Simply put, limiting the extent to which the media can identify accused persons, directly affects their ability to produce interesting stories. This in turn may affect profitability of that media organisation.

E Encouraging Other Victims to Come Forward

Another often cited reason to publish an accused name is to encourage other victims to come forward. The author acknowledges there may be cases where publication of a persons name will result in other victims coming forward, and so potentially result in other prosecutions. However the question must be considered as to whether publication of name prior to a judgment would have any greater effect than publication after a conviction, in bringing victims forward.

It is acknowledged that the argument could be raised that if the person is acquitted, then there would not be the opportunity to publish the persons name, and so therefore the opportunity would be missed to encourage others to come forward (if the person has in fact offended against others). However, given the proposition above that there should be an ability to apply to the court to allow the release of accused's name, if there was evidence of other offending, then an application could be brought, and the accused's name potentially released.

F Absence of Publicity May Result in Suspicion Falling On Others

The courts have acknowledged that a benefit of naming an accused, is that it ensures that suspicion from the public does not fall on other, non-involved persons. There could be little doubt that the act of publicly naming the accused

will go some way to ensuring the community do not suspect other persons as having committed the proposed crime. As stated in *Lewis v WH:*[161]

> ...The best protection against speculation is the freedom to receive and impart information recognised by s 14 of the New Zealand Bill of Rights Act 1990. A full report of what transpired...would be a complete answer to a baseless rumour and conjecture.

In the authors opinion, this argument is flawed for two reasons. Firstly, it is premised on the view that the particular crime is one where others might be suspected. The author would suggest that with the majority of crimes, the people who have knowledge of that crime will know who either committed it or is accused of having done so. In those cases the individuals will either have first hand knowledge of the alleged offender, or the Police would have informed the victim as part of their routine processes.

Secondly, the cases where suspicion may be in issue, is likely to be those cases reported by the media. As noted earlier in this paper, it is only a minority of criminal charges which result in publication in the media. Furthermore, often the cases reported by the media are cases of serious offending, for which a significant proportion of accused will be remanded in custody, which the media would no doubt report. That fact should significant lower the risk of others being suspected (if the accused is in custody, suspicion could not realistically fall on a person at large in the community).

It is acknowledged there may be an issue with suspicion falling on others, when the media report the case citing a group the accused is involved with (for example, "an All Black appeared in court charged with assault..."). These situations could be remedied either by the media being more cautious on how they choose to refer to an accused with name suppression, considering the effect of suspicion falling on others, or by an application to the court to name the accused if suspicion on others in that particular case was a material issue.

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

XVIII HOW SHOULD THE NEW ZEALAND LAW BE DEVELOPED?

In the author's opinion, the New Zealand law should be developed to allow for automatic pre-judgment name suppression of accused. However any development should allow for applications to be made to vary or release an accused's name for publication.

Given the long and well settled common law regarding name suppression, any development as proposed above would need to be the result of changes to statute. Given the relevance of the Criminal Justice Act 1985 to the issue of name suppression, any development may be centred on an amendment to that Act.

XIX CONCLUSION

The law surrounding name suppression in criminal cases in New Zealand has developed from the common law, but is now also contained in a number of statutes, primarily the Criminal Justice Act 1985. The consistent starting point for any application for name suppression has been that the name should be released due to the principle of open justice and freedom of expression. To succeed in an application for name suppression, the applicant's burden is significant. A strong factor for suppression is when there is any risk of jeopardising a fair trial, otherwise interests such as privacy, presumption of innocence, or other factor relating to the accused are likely to be of secondary consideration to the court.

It must be recognised that the law in New Zealand, as well as in other jurisdictions, is developing to recognise a greater personal interest in privacy. There could be little doubt that publication of a person's name in relation to an accusation of criminal offending, would be a significant invasion of that persons privacy, and may have significant if not devastating effects on that person, or their family. Those effects may be disproportionate to the charge, or wholly unwarranted if the person was in fact innocent. The courts have recognised these significant effects from publication of an accused's name.

In the authors opinion there are strong arguments for the law to be developed to provide an automatic suppression of an accused's name in criminal cases, with the ability to apply to the court to release the name of the accused, and hence to allow publication at the discretion of the court. This is essentially a reverse presumption to the current law. As the majority of criminal charges are for generally minor offending, and as such unlikely to be reported in any event, any development in the law would only have a likely effect on a minority of those charged, albeit those facing more serious charges, or accused persons who are of public interest.

Criminal Justice Act 1985

138 Power to clear court and forbid report of proceedings

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

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

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

(i) The evidence adduced; or

(ii) The submissions made:

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

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

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

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

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

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

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

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

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

(7) Every person commits an offence and is liable on summary conviction to a fine not exceeding $1,000 who commits a breach of any order made

under paragraph (a) or paragraph (b) of subsection (2) of this section or evades or attempts to evade any such order.

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

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

139 Prohibition against publication of names in specified sexual cases

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

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

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

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

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

(a) that person—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

139A Prohibition against publication of names in specified sexual cases

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

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

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

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

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

(a) that person—

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

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

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

(2) No person shall publish, in any report or account relating to proceedings in respect of an offence against section 130 or section 131 of the Crimes

Act 1961, the name of the person accused or convicted of the offence or any name or particulars likely to lead to the person's identification.

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

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

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

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

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

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

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

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

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

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

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.

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