PHILIPPA J. HARRAY

THE IMPACT OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990 ON SUPPRESSION ORDERS AND THE LAW OF SUB JUDICE CONTEMPT

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The healthy winds of publicity should blow through the workings of the Courts. The public should know what is going on in their public institutions. It is important that justice be seen to be done.

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

CONTENTS

	Contents		i
	Abstract		ii
I	Introduction		1
II	Rights and Freedoms in the Bill of Rights		2
	A	Approach to the Bill of Rights	2
	B	International Treaties	6
	C	Section 14 of the Bill of Rights	8
	D	Section 25(a) of the Bill of Rights	13
III	Criminal Justice Act 1985		20
	A	Background to the Criminal Justice Act	22
	B	Section 138	23
	C	Sections 139 and 139A	32
	D	Section 140	34
IV	Sub Judice Contempt		38
	A	Definition and Purpose	38
	B	New Zealand Test for Sub Judice Contempt	40
	C	Approach to the Bill of Rights	41
	D	Canadian Approach	45
	E	Conclusion	49
V	Conclusion		50
	Appendices		
	Bibliography		

ABSTRACT

The interests of justice require that the courts are open to the public but also that in some cases information is suppressed or the court cleared. This paper considers the tension between the right of freedom of expression and the court's powers to restrict public access to information about court proceedings. It concludes that the court's statutory discretionary powers to suppress must be exercised consistently with the rights in the Bill of Rights. The common law rule of sub judice contempt must be modified to ensure the rights of the Bill of Rights are limited as little as possible.

This paper contains approximately 13567 words excluding Contents page, Abstract page, footnotes, Bibliography and Appendices.

I INTRODUCTION

Freedom of expression is the watchdog of the justice system, ensuring that persons before the court are treated fairly and with parity, and that the public is kept informed of judicial decisions and trends. Sub judice contempt, suppression orders,[1] freedom of expression and a fair and public hearing all have the common purpose of protecting the integrity of the justice system. Despite this common purpose sub judice contempt and suppression orders conflict with the rights and freedoms in the New Zealand Bill of Rights Act 1990 ("the Bill of Rights") which also seeks to protect the integrity of the justice system. This tension is the focus of this paper.

Sub judice contempt and suppression orders should be used only in a way which limits freedom of expression as little as possible. Information about court proceedings can be withheld from the public either by a court order made under the Criminal Justice Act 1985 or by the common law of sub judice contempt. It is the contention of this paper that in New Zealand sub judice contempt and suppression orders are used more regularly and for alternative reasons than their stated objective.

This paper will consider the conflict between the right to freedom of expression protected by section 14 of the Bill of Rights and the right to a fair and public hearing as protected by section 25(a) of the Bill of Rights. The court's statutory powers to make orders under sections 138 - 140 of the Criminal Justice Act 1985 ("Criminal Justice Act") and the common law powers to punish for sub judice contempt conflict with these rights.

The first part of the paper considers the rights and freedoms in the Bill of Rights and the approach to be taken to them by the New Zealand courts. As a signatory to the International Covenant of Civil and Political Rights ("International Covenant") New Zealand has international obligations which will be considered. The final two sections consider the Criminal Justice Act and the common law of sub judice contempt. This paper concludes:

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1 For the purposes of this paper "suppression orders" refer to all orders the court has the power to make under the Criminal Justice Act 1985 as discussed in Part III of this paper.

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(1) The scope of the common law of sub judice contempt must be narrowed to comply with the rights and freedoms affirmed and protected by the Bill of Rights.

(2) The discretionary powers conferred by the Criminal Justice Act must be exercised so as to impose only reasonable limits which are demonstrably justified in a free and democratic society on the rights and freedoms affirmed and protected by the Bill of Rights.

II RIGHTS AND FREEDOMS IN THE BILL OF RIGHTS

This section examines the approach to be taken to the Bill of Rights. It outlines the purpose of the right in the context of court proceedings before considering actual or potential conflicts and how they can be resolved.

A The Approach

When interpreting the rights and freedom in the Bill of Rights a purposive interpretation is to be preferred.[2] In ascertaining the purpose of the rights it is submitted that it is necessary to look at the context[3] in which the rights are being recognised. A contextual approach does not necessitate losing sight of the broad principles of the right but ensures that the value of the right or freedom being protected is viewed in context.

A purposive interpretation in a specific context is similar to the Canadian approach as discussed below. Under the Canadian Charter of Rights and Freedoms ("the Charter") the Canadian courts have had

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2 The Bill of Rights is to receive a purposive interpretation and is not to be construed narrowly or technically. R v Butcher and Burgess [1992] 1 NZLR 257, 264; [1990-1992] 1 NZBORR 59, 70, per Cooke P. "What can and should now be said unequivocally is that a parliamentary declaration of human rights and individual freedoms, intended partly to affirm New Zealand's commitment to internationally proclaimed standards, is not to be construed narrowly or technically."

3 See Edmonton Journal v Alta (A-G) 64 D.L.R. (4th) 577 (SCC) 583 and 584 on the contextual approach

numerous opportunities to consider the right of freedom of expression,[4] and the right to a fair and public hearing[5] and the relationship between the two rights. They have also determined what limits are justifiable limitations (under a section 1 of the Charter[6] analysis) on each.

When weighing the competing interests and values of sections 2(b) and 11(d) of the Charter the Canadian courts have started by looking at the objectives of a right, and the values which the right was designed to protect, using a purposive interpretation of Charter rights. Wilson J succinctly summarized this approach and its underlying jurisprudence in Edmonton Journal v Alberta (A.G.) when she said:[7]

> [I]t is necessary to ascertain the underlying value which the right alleged to be violated was designed to protect. This is achieved through a purposive interpretation of charter rights. It is also necessary under each approach to ascertain the legislative objective sought to be advanced by the impugned legislation. This is done by ascertaining the intention of the legislature in enacting the particular piece of legislation. When both the underlying value and the legislative objective have been identified, and it becomes clear that the legislative objective cannot be achieved without some infringement of the right, it must then be determined whether the impugned legislation constitutes a reasonable limit on the right which can be demonstrably justified in a free and democratic society.

The nature of the right needs to be considered. The right to freedom of expression is a public right which cannot a person charged with an offence cannot waive. It is unlikely that an accused has the power to waive the right[8] to a public hearing despite it being a right only exercisable by him or her[9]

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4 Section 2
Everyone has the following fundamental freedoms
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

5 5 Section 11
Any person charged with an offence has the right
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

6 Section 1
The Canadian Charter of Rights and Freedoms guarantees the rights and freedom set out in it subject only to such reasonable limits prescribed by law which can be demonstrably justified in a free and democratic society.

7 Above n3, 581.

8 The right to a public hearing is not only a right but a duty. While it is the accused's right, the public has an interest in it. It is suggested that the criteria set out in section 25 are not 'rights' as such but the word 'right' has been used to fit with terminology in the Bill of Rights. Section 25 in fact sets out minimum standards which shall apply to reflect society's basic standards for determination of charges of offenses.

and is not able to be enforced by the public or the media. It is not possible under New Zealand law for parties to opt for a closed hearing.[10] In Herbert[11] the majority of the Supreme Court of Canada held the doctrine of waiver had no application to the section 7 right to remain silent. Ironically although the right is fundamental to an accused's right to a fair hearing, in New Zealand most accused would choose to waive the right to a public hearing.

In Canadian Newspapers Co Limited v AG Canada[12] the Ontario Court of Appeal held that the right under section 11(d)[13] is the right of the accused, not of the general public or of the press. It is therefore, like other Charter rights, subject to reasonable common law or statutory limits by virtue of section 1. In contrast to the constitutional right to a public trial the accused has no right to demand a private trial. A public trial is in effect imposed on a citizen. The Canadian courts have taken a consistently held that society's interests and public justice continue to take precedence over the individual's interests and privacy. The public interest in open justice outweighs the risk of embarrassment to the accused.[14]

The operative section in the Bill of Rights create a different statutory framework then other human rights instruments. This will affect the application of the rights. Sections 4, 5 and 6 of the Bill of Rights

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9 Section 25's opening words show that this provision only provides rights to the accused, and not to the media. The Supreme Court of Canada in Canadian Newspapers Co. v Can. (A.G.) ([1988] 2 SCR 112, 134) doubted doubt that the media could itself invoke the equivalent Canadian provision,section 11(d) of the Charter. Compare section 14 which applies to all persons as defined by the Bill of Rights and the right of the media to apply for suppression orders made under the Criminal Justice Act to be lifted. For example see R v Keys and Ors (No 17) Unreported, 11 June 1993, High Court, Christchurch Registry T 9/93, which involved an application be TVNZ for a suppression order to be lifted. See also C. Baylis "Justice Done and Justice Seen to be Done - the Public Administration of justice" (1991) 21 VUWLR 177, 200 "Applications for review of a suppression order can be made by the parties to an action or by members of the media who have standing by virtue of the fact that they are affected by the order provides no assistance to the media or the public if the accused does not object to the exclusion of the public."

10 Above n9.

11 (1990) 77 C.R. (3d) 145 (S.C.C.)

12 (1985) 17 CCC (3d) 385

13 The right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

14 J Atrens The Charter and Criminal Procedure, the Application of Sections 7 and 11 (Butterworths, Toronto, 1989), para 6.28.

are the operative sections of the Act. The approach to these sections, in particular the order in which they are considered, affects the application of the Bill of Rights.[15]

In this paper it will be submitted that section 6 should be applied to the statutory discretionary powers under the Criminal Justice Act. While the wording of the sections in the Act considered are not ambiguous it is submitted that when the court exercises its discretion it must do so in a way which gives effect to the rights and freedoms in the Bill of Rights. The sections in the Criminal Justice Act set out justifiable limits on the right and accordingly section 5 is not applicable when considering the Criminal Justice Act. However section 5 is of paramount importance when considering the common law of sub judice contempt.

In considering the tension between the powers to suppress in the Criminal Justice Act and the rights in the Bill of Rights it is submitted that the correct approach is to apply section 6 to the exercise of the discretionary powers to ensure they are exercised consistently with the rights and freedoms in the Bill of Rights. The right to freedom of expression may be limited on one of the grounds set out in section 138(2) of the Criminal Justice Act. Accordingly there should be no further limitation on the right to freedom of expression under a section 5 analysis.

With regard to the common law of sub judice contempt once a prima facie violation has been found a section 5 analysis will be used to ascertain whether the limit on the right and freedom is demonstratively justifiable in a free and democratic society.

The Canadian cases which apply the Canadian equivalent of section 5 will however be considered to give an indiction of what has been held to be justifiable limitations in Canada. A section 5 analysis is used in Canada as the Charter does not have an equivalent of a section 4 and so the courts may strike down legislation which is not a justifiable limitation.

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15 Paul Rishworth "Two comments on Ministry of Transport v Noort: A - How does the Bill of Rights work?" [1992] NZRLR 189 suggests the correct approach is to first consider section 5 then section 6 then section 4 while Fisher J in R v Herewini (1992) 3 NZBORR 113; [1993] 2 NZLR 747; (1992) 9 CRNZ 307 suggests the approach is section 4 then section 6 then section 5.

B International Treaties

The International Covenant[16] is applicable to New Zealand domestic law as the Bill of Rights was enacted "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".[17]

The Court of Appeal in R v Butcher and Burgess[18] held that the Bill of Rights was to be interpreted in light of the Covenant and internationally proclaimed human rights standards and not the common law[19]. This confirms that "[i]n approaching the Bill of Rights it must be of cardinal importance to bear in mind the antecedents".[20] In Goodwin (No 2)[21] the court said "[w]hether a decision of the Human Rights Committee is absolutely binding in interpreting the New Zealand Bill of Rights Act may be debatable, but at least it must be of considerable persuasive authority"[22]. Therefore the decisions of the Human Rights Committee on Articles 14 and 19 must be of "persuasive authority at the very least".

Section 4 of the Bill of Rights provides that no provision of an enactment is repealed or revoked by the Bill of Rights. There is no parallel Article to section 4 in the International Covenant. Therefore the Human Rights Committee which considers only the Covenant and not the Bill of Rights is fully capable of finding if a statute violates the International Covenant and therefore ought to be repealed or amended. It is also capable of recommending that the complainant who has been damaged by a violation of the International Covenant be awarded compensation for that damage.

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16 New Zealand is a party to the Optional Protocol to the Covenant on Civil and Political Rights entered into force for New Zealand on 26 August 1989. The International Covenant creates obligations on the signatories, binding in international law, to comply with various articles, both in policy and legislation. This protocol gives individuals who claim to be aggrieved by a violation of the Covenant by New Zealand the right to petition the United Nations Human Rights Committee (hereinafter the Human Rights Committee) which sits in New York. However complainants must first exhaust all available domestic remedies.

17 Long Title to the Bill of Rights.

18 Above n2.

19 Above n2, 264 or 70 per Cooke P.

20 Noort v MOT; Curran v Police [1990 - 1992] 1 NZBORR 97, 142 per Cooke P. (1992) 8 CRNZ 114, [1992] 3 NZLR 260.

21 (1993) 9 CRNZ 394.

22 Above n21, 398 per Cooke P.

Section 14 affirms in particular New Zealand's obligations under Article 19[23] of the International Covenant. Section 25(a) affirms New Zealand's obligations under Article 14(1)[24] of the International Covenant. Therefore one needs to interpret sections 14 and 25(a) in light of the words of, and rulings by the Human Rights Committee on Articles 19 and 14.

In contrast with the Bill of Rights, Articles 14 and 19[25] of the International Covenant and Articles 6 and 10 of the European Convention of Human Rights contain restrictions rather than being subject to the type of limitation contained in section 5 of the Bill of Rights and section 1 of the Charter.[26] If the courts argue that their decision was in accordance with domestic law and that it is up to the legislature to change any law that violates an International Treaty, it does not affect a country's culpability under international law.[27]

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23 Article 19 of the International Covenant provides:

1. Everyone shall have the right to hold opinions without interference.
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 [sic] choice.
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 as are provided by law and are necessary:
(a) For the respect of the rights of others:
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

24 Article 14(1) provides:

1. All persons shall be equal before the Courts and Tribunals. In the determination of any criminal charge against him, or his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interests of the private lives of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit of law shall be made public except where the interests of juvenile persons otherwise require or the proceedings concern matrimonial disputes or the guardianship of children.

25 Article 4(2) International Covenant neither Article 14 nor Article 19 covered by non-derogation principle.

26 See the <u>White Paper to the Bill of Rights</u> on why the Bill of Rights was drafted this way.

27 In <u>Lingens</u> v <u>Austria</u> 8 EHRR 407,421 para 46 it was held: "In this context the Court points out that it does not have to specify which national authority is responsible for any breach of the Convention; the sole issue is the State's international responsibility."

The <u>Lingens</u> decision refers to <u>Zimmermann and Steiner</u> v <u>Switzerland</u> (1984) 6 EHRR 17 para 32 an authority for this point of view.

See also Cooke P.'s comments <u>Temese</u> v <u>Police</u> CA 209/92 27/11/92 at page 4.

The introduction of the "margin of discretion"[28] is fundamental to the development of the Human Rights Committee jurisprudence. There is "no universally applicable moral standard" and the Human Rights Committee's approach suggests that it will not attempt to establish standards of international morality. The margin of discretion allows international standards to be interpreted or waived according to domestic conditions.

The "margin of discretion" is the main reason that many of the international cases will not provide clear authorities for New Zealand. The wording of the Articles in the International Treaties will be of paramount importance but the decisions of the Human Rights Committee and the European Court of Human Rights have to date provided little guidance for New Zealand in this area.

Though the "margin of discretion" has its critics, it has assumed great importance in the jurisprudence under the International Covenant and European Convention of Human Rights. The approach taken determines the balance struck between national and international implementation. On the facts of <u>RM v Finland</u>[29] the margin of discretion appears to be very wide. There was not even the most cursory consideration of the "necessity" of the restrictions imposed and the majority of the Human Rights Committee felt "it could not question the decision of the responsible organs of the FBC".

C Section 14 Freedom of Expression

Section 14 of the Bill of Rights provides:

> 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.

Freedom of expression is of central importance in a democratic state. It is concluded for the following reasons that it does not have pre-eminence over other rights in New Zealand as in some other

28 "Margin of discretion" is also referred to as "margin of appreciation".

29 Doc.A/44/40,p.300.

countries.[30] In the drafting of some international instruments it has been suggested that this right should be given fundamental importance[31]. It is not by accident or chance that the First Amendment to the United States of America's Constitution protects freedom of speech. Freedom of expression is found in section 2 of the Charter being the first right referred to in the Charter.

The four grand purposes of freedom of expression identified in the White Paper[32] commentary on article 7[33] are a clear indication of its fundamental importance in a democratic society. They are:

(1) individual fulfilment of self-expression,
(2) democratic self-government,
(3) the advancement of knowledge and revelation of truth,
(4) the achievement of a more adaptable and hence a more stable community.

While it is submitted that section 14 should cover all information,[34] the right is not absolute.[35] The right to freedom of expression does not carry with it the right to incite violence, or to defame others, or to engage in commercial fraud. For example, the right to freedom of expression would scarcely justify the release of prejudicial evidence prior to a trial. This would be consistent with the right to a fair hearing.[36] The freedom is subject to limitations imposed by law[37] regulated in advance (for

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30 In Bridges v California 314 US 252 (1941) the United States Supreme Court has clearly pointed out the difference in approach between the United States and England in its comment "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed".

31 See discussion below on article 19 of the International Covenant of Civil and Political Rights.

32 Above n26, para 10.54.

33 Which had identical wording to section 14 of the Bill of Rights.

34 The right should be interpreted widely and limited after a conflict with another provision is established as discussed below.

35 By virtue of section 5 of the Bill of Rights all rights are expressly subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

36 See The White Paper on the Bill of Rights prepared in 1985 at 10.24 and the commentary on article 17 (1) (a).

37 In O'Connor v Police [1990-1992] 1 NZBORR 259 Thomas J set out at p275, a comprehensive list of limits on freedom of expression applicable in this area.

example a suppression order under the Criminal Justice Act) or after the event (for example a charge of sub judice contempt).[38]

Section 14 creates a public right[39] and as Thomas J noted in O'Connor v Police that:[40]

> while, ... , the position adopted by the particular defendant will no doubt be significant, it is not a right which he or she can automatically waive. The public interest in freedom of expression is to be recognised apart from the interest of the individual.

The following section of this paper outlines the scope of the right. Section 14 of the Bill of Rights, Article 19(2) of the International Covenant and Article 10 of the European Convention on Human Rights include both the right to impart information and to receive information. Section 2(b) of the Charter and the First Amendment to the United States Constitution only refer to impart.[41]

Thomas J recognised two distinct rights in section 14 namely the "right for the news media to publish information and [the] right for the public to receive that information".[42] He cited with approval Lord Denning in Schering Chemicals Ltd v Falkman Limited:[43]

> Freedom of the press is of fundamental importance in our society. It covers not only the right of the press to impart information of general interest or concern, but also the right of the public to receive it.

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38 The White Paper to the Bill of Rights, para 10.55.

39 Compare section 25 which applies to everyone "charged with an offence".

40 Above n37, 274.

41 This distinction was noted by Cooke P. in TV3 Network Ltd v Eveready Unreported, 17 February 1993, Court of Appeal, CA 237/92.

42 Above n 1 at 274.

43 [1982] QB 1, 22; [1981] 2 All ER 321, 324

Unlike the United States of America, Canada or Germany, New Zealand has no separate protection for freedom of the press as distinct from freedom of speech although it is suggested that freedom of the press falls within section 14.[44]

The purpose of freedom of expression in the context of a hearing for a person charged with an offence at its simplest level is to ensure that justice is not only done but seen to be done. As immortalised by Lord Hewart LCJ in R v Sussex Justices ex p McCarthy[45] "[I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".

The importance of public trials and the part freedom of expression plays in a fair and public hearing can be seen in Lord Diplock's remarks in Attorney-General v Leveller Magazines Ltd.[46]

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44 See Elkind and Shaw Standard for Justice (OUP, New Zealand, 1986) page 53,54.
It is suggested that although freedom of the press falls within section 14 of the Bill of Rights it should ideally be protected separately. The two freedoms are fundamentally different concepts. Freedom of the press is an institutional and instrumental freedom, derivative from freedom of speech. To put it another way; freedom of the press is instrumental while freedom of speech is fundamental. Media freedom which should be respected because and in so far as it fosters the values of freedom of speech. The freedom of the press is vital to ensure the uninhibited public debate without which our democratic political life would fail. But equally the media should not be allowed to claim for freedoms, the exercise of which is inimical to that debate.

Freedom of the press and freedom of expression differ in other ways:
(i) They have different histories. Freedom of expression was first elucidated in about 1540 and originally derives from what is now referred to as parliamentary privilege while freedom of the press comes from the censorship of literature under the Crown's prerogative control over printing during the 1600's.
(ii)Some issues such as legal privilege from revealing sources and access to information are not relevant to private individuals while are imperative to the press.
(iii) The obligations of the press are different from the obligations of individuals.

45 [1924] K.B. 256,259.

46 [1979] 2 WLR 247 at 282:

As a general rule the English system of administering justice does require that it is done in public: ... 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 ... 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.

Helpful guidance on deciding what objectives warrant infringing on freedom of expression can be obtained from the Supreme Court of Canada.[47] Communications about courts foster the rule of law and also foster the levelling of constructive criticism of courts' behaviour. This purpose of freedom of expression in relation to court proceedings is very obvious in the decision of Williamson J in re Keys (No. 17)[48]. In that case Williamson J. criticised the press for what he perceived to be criticism of the manner in which the court's administer justice based on inaccurate information. With respect, however, it is submitted that it is not surprising that the press may have been misguided as to the steps taken by the Court in that particular case in light of the suppression orders made during the trial.

On a more lateral level freedom of expression acts as a deterrent against offending which is clearly in the public interest. Publicity is a recognised part of the punishment of a person convicted of an offence.

Article 19 of the International Covenant being the protection of freedom of expression in the International Covenant has been the subject of a General Comment[49] by the Human Rights Committee.[50]

D Section 25(a) The Right to a Fair and Public Hearing by an Independent and Impartial Court

Section 25(a) of the Bill of Rights provides:

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47 It has acknowledged, at least to some extent, a number of objectives which are served in general by the Charter's guarantee of freedom of expression. These include securing democratic self-government, achieving good or intelligent government, fostering participation in political and social decision-making, providing a balance between stability and change in Society, facilitating the search for truth and knowledge through a marketplace of ideas, promoting social pluralism and diversity, safeguarding individual autonomy and self-development, and providing the necessary underpinning for other rights and freedoms in society. David Schneiderman (ed.) Freedom of Expression and The Charter D.M.Lepofsky Part I p.10,11.

48 Above n9.

49 D McGoldrick The Human Rights Committee (Clarendon Press, Oxford University Press, 1991) suggests that the General Comment on Article 19 was both weak and disappointing, being little more than a reiteration of Article 19. He further suggests it is unlikely that the work of the Human Rights Committee will redress the disappointing record of the United Nations concerning freedom of expression.

50 10 (19) adopted by the Human Rights Commission at its 461st meeting on 27/7/83, DOC. A/38/40, p.190. Also in DOC. CCPR/C/21/Add. 2. For the Human Rights Commission's discussion see SR 449, 457 and 461.

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) the right to a fair and public hearing by an independent and impartial court.

...

The right to a fair and public hearing as affirmed and protected by section 25(a) is one of the basic principles of criminal justice.[51] It includes the right to freedom of expression including imparting and receiving information and opinions about court proceedings.

It was held in Edmonton Journal that:[52]

> [T]he public interest in open trials and in the ability of the press to provide complete reports as to what takes place in the courtroom is rooted in the need (1) to maintain an effective evidentiary process; (2) to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by society; (3) to promote a shared sense that our courts operate with integrity and dispense justice; and (4) to provide an ongoing opportunity for the community to learn how the justice system operates about the law being applied daily in the courts affects them.

Section 138(1) Criminal Justice Act 1985 codifies the general principle that "every sitting of any court dealing with any proceedings in respect of an offence shall be open to the public". It is subject to subsections (2) and (3) and any other enactment.

The principle that courts should be open unless the interests of justice or its administration are threatened was espoused by Thomas J in O'Connor v Police. He said "[i]n line with the authorities, therefore, the requirement that criminal proceedings be open to the public can only be departed from if not to do so would frustrate the interests or administration of justice."[53]

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51 Above n26, para 10.111. The importance of public trials was recognised by the House of Lords in 1913 in Scott v Scott [1913] AC 417, 463 (HL), where Lord Atkinson opined "It is felt that in public trial is to be 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". Robertson J held in R v Chignell & Walker [1990-92] 1 NZBORR 179,183 "A fair trial is the goal of any civilised society - a trial which is fair to the prosecution, the general community, and the accused."

52 Above n3, 588.

53 Above n37, 272.

Openness contributes to the proper administration of justice and it serves the broader values of the public's right to know and to participate, and the media's right to inform and comment. It may protect the fairness and impartiality of the trial process.[54]

The Human Rights Committee in its comments on Article 14 emphasised the importance of a public trial and the "exceptional circumstances" which must exist to exclude the public. The Committee maintains that a public hearing cannot exclude members of the press or limit attendance to only a particular category of persons.

The Canadian courts have recognised that openness in the administration of criminal justice is essential in any free and democratic society.[55] According to the Law Reform Commission of Canada[56] derogations from the principle of openness have been made in a piecemeal fashion, for the purpose of protecting three broad categories of interests, which the Commission describes as follows:

(1) protecting vulnerable individuals, such as the victims of crime, witnesses or accused;

(2) ensuring that the criminal process is carried out without interference from elements within the court or extraneous influences; and

(3) serving other social interests, such as public morals or effective law enforcements.

Criminal offenses by their nature are crimes against the state and accordingly the state has an interest in the determination of the charge by its representatives, judges. To enable the state to ensure that its representatives are carrying out their delegated function in its best interests it is vital that the public has information about court proceedings for which it relies on the press. The Judges, as the representatives

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54 Above n14, para 6.26.

55 Before the Charter, Canadian courts had recognised a number of values which are served by the openness of courts to public attendance. Openness of the courts serves to promote the effective administration of justice, to prevent abuse of the individual by Judges, prosecutors or police, to ensure public scrutiny of the courts, to foster public confidence in the administration of justice, to foster the giving of honest testimony, and to ensure that justice is not only done, but it is seen to be done. It not only fosters confidence in the justice system on the part of the public but also on the part of litigants who submit themselves to that process.

56 Public and Media Access to the Criminal Process (Working Paper 56) Ottawa: Law Reform Commission of Canada, 1987).

of the state, have the power to suppress information in accordance with various statutes. The freedom of the press therefore plays an important role in protecting everyone's right to receive information.[57]

The right to a fair and public hearing by an independent and impartial court affirmed by section 25(a) applies only with respect to the determination of the charge of an offence. There has been judicial consideration internationally and in New Zealand and Canada as to the interpretation of "charge" and "offence".[58]

In Dowey & Another v Ministry of Agriculture and Fisheries[59] Hardie Boys J in delivering the judgment of the Court held:[60]

> Section 25 is directed to two matters, the statutory or regulatory procedure prescribed for the conduct of criminal proceedings, and the manner in which the judicial officer concerned discharges his or her responsibilities within that procedure.

The Supreme Court of Canada in R v Wigglesworth[61] held "offence" in section 11 (being the Canadian equivalent of section 25) included all federal and provincial offenses to be tried by courts irrespective of penalty including both criminal and penal offenses. With regard to "charge" the Supreme Court of Canada in R v Kalanj,[62] determined by a 3:2 majority, that a person is charged with an offence within

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57 See Thomas J.'s comments in O'Connor, above n37, 271, for a comprehensive statement on the role of Judges in society and the role the media play in enabling society to scrutinise and supervise the operation of the courts.

58 The wording in the International Treaties differs slightly from section 25(a). Article 14(1) of the International Covenant applies "in the determination of any criminal charge against him, or his rights and obligations in a suit of law" and Article 6 of the European Convention on Human Rights applies "in the determination of his civil rights and obligations or of any criminal charge against him." Both the Bill of Rights and the Charter use the words "charged with an offence".

59 CA 355/91, CA 356/91, May 11, 1992, Hardie Boys, Gault and McKay JJ.

60 Above n59, 7.

61 (1987), 60 C.R. (3d) 193 (S.C.C.).

62 (1989), 70 C.R.C. (3d) 260 (S.C.C.).

the meaning of section 11 from the moment an information is sworn by a justice alleging an offence or, where no information is sworn, when a direct indictment is laid.[63]

There has been little specific discussion under the reporting procedure of the key terms "criminal charge" and "rights and obligations in a suit of law".[64] The Human Rights Committee did address the issues in its General Comment and confirmed that its scope is wider than criminal charges.[65]

The Human Rights Commission in X v Austria Yearbook VII[66] formulated the following test as to when Article 6 of the Convention applies:

> The term 'civil rights and obligations' employed in Article 6(1) of the Convention cannot be construed as a mere reference to the domestic law of the High Contracting Party concerned, but on the contrary relates to an autonomous concept which must be interpreted independently of the rights existing in the law of the High Contracting Parties, even though the general principles of domestic law in the High Contracting Parties must necessarily be taken into consideration in any such interpretation.

An important step in the direction of such an autonomous interpretation of "civil rights and obligations" was taken by the Court in the Ringeisen case. There, the Court held that the question of whether the judicial proceedings in question were civil, administrative, or criminal is not decisive for the determination of whether civil rights and obligations are in issue. The only decisive question is whether

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63 The minority held that a person is charged not upon an ex parte formal laying of an information before a justice but rather when the impact of the criminal justice is felt by the accused. Commentators have been critical of the majority decision suggesting that the minority position is far more consistent with a "purposive" approach to the Charter. It much better furthers the interests protected by the various section 11 rights. See Don Stuart Charter Justice in Canadian Criminal Law (Carswell: Toronto, 1991) page 222.

64 Above n49, para 10.4.

65 The Committee said "In general, the reports of States parties fail to recognise that Article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine the rights and obligations in a suit of law. Laws and practices dealing with these matters vary widely from State to State. This diversity makes it all the more necessary for States parties to provide all relevant information and to explain in greater details how the concepts of 'criminal charge' and 'rights and obligations in a suit of law' are interpreted in relation to the respective legal systems." (GC 13/21 DoC. A - 39-40 pp 143-7, pr.2)

66 Appl. 1931/63, (1964), p.212 (222).

the result of the proceedings in question amounts to the determination of civil rights or civil obligations of both parties or one of them.[67]

Unlike the European Court of Human Rights, members of the Human Rights Committee have not, under the Article 40 process, subjected the public hearing guarantee and its limitations to detailed analysis and consequently there has been little real discussion of the meaning of the specified grounds of limitations.[68] Section 25(a) requires that the Court be open, suppression orders be made only in exceptional circumstances and the judgment be made public in all circumstances. The Human Rights Committee has made a General Comment on Article 14 but it provides no assistance in ascertaining what constitutes a public hearing or what are justifiable limitations to that.[69] As with Article 19 the majority of the Human Rights Committee's views on Article 14 have concerned Uruguay[70].

The duty to hold public hearings is not dependent on any request by interested parties. The courts must make information on time and venue of oral hearings available to the public and provide for adequate facilities for the attendance of interested parties of the public within reasonable limits[71]. Notice of the alleged violation of the requirements of a public hearing and a public judgment have concerned the operation of military tribunals in Uruguay.[72] In Touron v Uruguay[73] Touron had been charged with offenses of conspiracy and subversion. There was no public hearing, Touron was not allowed to be present or to defend himself and the judgment was not made public. The Human Rights Committee quite rightly took the view that Article 14(1) had been violated because Touron had no public hearing.

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67 P van Dijk and G H J van Hoof Theory and Practice of the European Convention on Human Rights (Kluwer Law and Taxation Publishers, Deventer/Netherlands, 1984) 239.

68 Above n49, para 10.10.

69 See General Comment 13/21, Doc. A/39/40 (adopted 12 April 1984 (SR 516) and 23 July 1984 (SR 537)). Also in Doc. CCPR/C/21/Add. 3.

70 Above n49, para 10.24.

71 Van Meurs v Netherlands Doc. A/45/40, Apx., prs. 6.1-2.

72 The Conteris v Uruguay Doc. A/44/40 p.196, Weinberger v Uruguay Doc. A/36/40 p.114, Pietraroia v Uruguay Doc. A/36/40 p.153.

73 DOC A/36/40,120.

The nature of the facts means that the decision is of little precedent value to New Zealand.[74] It is highly unlikely under our current system that an equivalent fact situation would arise and if it did that the appeal courts would not find a breach of section 25(a). Cases such as Touron reveal a consistent pattern of alleged violations of Article 14: closed trials, conducted in writing without the alleged victim, his or her counsel, if any, nor close relatives allowed to be present, and a failure to make the judgment public.

In light of the limited number of cases, the extreme fact situations and the margin of discretion allowed by the Human Rights Committee it is submitted that the New Zealand courts will not be able to gain much guidance from the Human Rights Commission as to what the public hearing guarantee and its limitations involve.

While section 25(a) is silent as to the delivering of the judgment in light of section 138(6)[75] and Article 14 of the International Covenant, it is submitted that the judgment must be made public including a decision in writing giving reasons.[76] "[P]ublic judgments are pinpointed as the fundamental feature

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74 For other Human Rights Committee decisions which show the types of fact situations that are in issue see:

Estrella v Uruguay (Doc. A/38/40, 150) where Estrella was told by an official whom he met at the prison where he was being detained that he had been sentenced to 4½ years imprisonment for "conspiracy to subvert action to upset the constitution and criminal preparations". The Human Rights Committee expressed the view that the facts disclosed, inter alia, a violation of Article 14(1) because Estrella was tried without a public hearing and no reason had been given by the state party to justify this in accordance with the covenant. In fact, to date, no state party has ever raised any of the exceptions to the public hearing requirement in answer to an allegation against it. (McGoldrick n49 para 10.31)

In RM v Finland, above n29, the Human Rights Committee stated that "it believe[d] that the absence of oral hearings in the appellant proceedings raises no issues under article 14 of the covenant".

75 Section 138(6) only requires that the verdict and sentence be made public with no requirement to make public details of evidence or reasons for the decision. It is submitted that the obligations under article 14 are fulfilled however it is difficult to assess the appropriateness of the former without details of the latter.

76 Note difference between article 14(1) ICCPR and art 6 ECHR "any judgment rendered in a criminal case or in a suit of law shall be made public" (art 14(1)) and "judgment shall be pronounced publicly". see decisions of European Court Human Rights (EUCT)
Pretto v Italy EUCT Series A, Vol 71 (1983)
Axen v FRG EUCT Series A, Vol 72 (1983)
Albert and Le Compte v Belgium EUCT Series A, Vol 58 (1983)
Sutter v Switzerland EUCT Series A, Vol 74 (1984)
Campbell and Fell v U.K. EUCT Series A, Vol 80 (1984)

of the public justice concept."[77] In New Zealand "judgment" in a criminal context is defined in Section 138(b) being the verdict and sentence. However judgment in a civil context is not so certain.[78]

The right to a public judgment[79] requires that any judgment be in writing. The Human Rights Committee found that where a judgment was not in writing it could not hold that the proceedings or the severity of the sentence complied with the covenant.[80] In Van Meurs[81] it was held that the trial violated Article 14(1) because the judgment rendered against him was not made public.

An important element of fairness of the trial is that the court should not consider evidence or circumstances which have not been presented to the court at trial or which are outside the material in the record of the proceedings. It may be inferred from the presumption of innocence and the requirement of proof beyond reasonable doubt that the accused is entitled to a judgment based on the evidence adduced at the hearing. In Estrella v Uruguay[82] the Committee held that a trial in camera violates Article 14(1), which provides when the public may be excluded from the trial if the State fails to provide a reason for not providing a fair trial.

Where a party is entitled to a public trial, the court must make information about time and venue of the proceedings available to the public and must provide adequate facilities for the attendance of interested members of the public.[83]

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77 Above n10, 180.

78 Above n10, 181. Consideration of what constitutes judgment in civil context is outside the scope of this paper.

79 Article 14(1). Article 14(1) states that the judgment of the court should be made public except in very limited circumstances involving juveniles or matrimonial disputes or the guardianship of children.

80 See Touròn v Uruguay Report 36 Session (A/36/40), Annex X.

81 Above n72.

82 38th Session (A/38/40), annex XII.

83 See Van Meurs v The Netherlands Report 45th Session (A/45/40, Volume II, Annex IX.F.).

It is arguable that the "public hearing" requirement is satisfied when the public is admitted to the Courtroom. In Canadian Newspapers[84] the Supreme Court of Canada held that section 11(d) is not infringed when a Judge, at a public hearing, orders the media not to publish certain information revealed in open Court, such as a sexual assault complainant's identity.

While the decisions of the Human Rights Committee are of "persuasive authority" and the decisions of the European Court of Human Rights useful, because of the extreme fact situations and the accepted "margin of discretion" as discussed above, considerable more guidance in this area, even if only of a jurisprudential nature, can be gleaned from the Canadian courts.

III CRIMINAL JUSTICE ACT 1985

The powers conferred by the Criminal Justice Act[85] prima facie violate the right to freedom of expression protected by section 14 and the right to a public hearing protected by section 25(a).

While many of the orders to date under the Criminal Justice Act may withstand a Bill of Rights analysis. However it is submitted that the court's basic approach must change to give effect to the Bill of Rights. In reconciling the conflict between the Criminal Justice Act and the Bill of Rights the current approach of the New Zealand courts is to balance freedom of expression on the one hand and a fair and public hearing on the other.[86]

It is suggested that this approach is fundamentally incorrect. The court should instead exercise its powers so that each right is violated as little as possible. It is not a justifiable reason to limit one right for the sake of the other nor to protect one at the expense of the other.[87] The court should attempt

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84 Above n9.

85 Sections 138-140 are set out in Appendix B.

86 In R v Keys above n9, it was initially held at page 3 that the Court had to balance the principle of open justice with the object. However later in the judgment on page 5 it was held that the Court had to balance section 14 with the need for a fair trial in particular cases. See also O'Connor v Police above n37, 272 were it was held that the principle of open justice must be balanced against the objective of doing justice.

87 See Canadian Newspapers, above n9 on "least restrictive alternative".

to find other ways of meeting the objectives achieved by prohibiting publication and closing the court, without infringing, the rights protected by the Bill of Rights. To do this the court must recognise the goal it is trying to achieve prior to making any order and then adopt an approach which allows it to reach its established goal, without infringing any right more than is absolutely necessary.

It is difficult to ascertain the frequency and extent of suppression orders and the scope of sub judice contempt. Unless someone has a pecuniary interest in referring to the case, for example the media, they avoid mentioning the decision because of possible contempt charges or fines.[88] Before the New Zealand law can be considered in context it is necessary to know how often suppression orders are made. It is not however possible to ascertain this with any degree of certainty.

One source of statistics is the Department of Justice which is responsible for recording all criminal convictions on the Wanganui Computer. This includes whether a suppression order was made. Appendix A refers to all suppression orders noted in the Wanganui Computer in 1992.[89]

The Law Society libraries, which update the main legal data base and can be accessed by the public, often do not list cases which have even slightly complicated suppression orders for fear of contempt charges or judicial disapproval. This attitude highlights the operation of contempt as a fetter to freedom of expression in both aspects; to receive and impart information. In cases involving only name suppression, the name can easily be deleted with the first initial of the surname often used but if the order is wider the decision tends to be returned to the Judge or held on a closed file. Accordingly it is difficult to ascertain the practical relevance that the degree of the tension between the Bill of Rights and the Criminal Justice Act.

88 Sections 138(2) and 139(2). Summary conviction $1000.00 fine.

89 However the Department of Justice cannot guarantee that all suppression orders have been noted on the decisions it receives or that some interim orders which were not made final were not deleted. Therefore for statistical purposes the figures only give an indication of the true picture.

A Background to the Criminal Justice Act

Prior to the Criminal Justice Act the court had powers under the Crimes Act 1961 (section 375), the Summary Proceedings Act 1957 (sections 35 and 156) and its inherent jurisdiction to make orders to close courts and prohibit publication of details. Sections 138-140 codify and consolidate existing powers replacing both statutory powers and the court's inherent jurisdiction[90] previously held to exist in such cases as Broadcasting Corporation v Attorney-General[91] in which many of these principles were discussed. However, nothing in these sections limits the court in its inherent jurisdiction from punishing for contempt in cases to which these sections do not apply.[92]

Section 138 consolidates the powers of the courts to clear the court and forbid reports of proceedings, previously set out in section 375 of the Crimes Act 1961, and sections 35 and 156 of the Summary Proceedings Act 1957. Sections 139 to 140 repeat the previous law governing the court's power to forbid publication of criminal proceedings.[93]

In O'Connor v Police[94] Thomas J confirmed that section 138(5) stipulates that the powers are in substitution for the inherent powers of the Court.[95] Moreover the Court noted that section 138(2) should not necessarily be equated with other concepts referred to in the section, i.e. public morality, the reputation of any victim of any sexual or extortion offence, or of the security or defence of New Zealand. Nor should it equate with the administration of justice simpliciter as distinct from the broad concept of the interests of justice.[96]

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90 Section 138(5) Criminal Justice Act 1985.

91 [1982] 1 NZLR 120.

92 Garrow & Turkington's Criminal Law in New Zealand (Butterworths, Wellington, 1991), s375.1, p682. Above n47, 64: Courts do not and should not have any inherent jurisdiction to suppress publication.

93 Notes to clauses 139 to 141 in the Introductory Bill.

94 Above n37, 264.

95 Compare X v Police Unreported, 9 October 1991, High Court, Auckland Registry, AP 253/91, where Barker J, after referring to O'Connor, observed "I think that the Court still retains very wide powers because of the breath of the expression "interests of justice" which expression should not be circumscribed and which probably equates with inherent jurisdiction". It is submitted that the approach of Thomas J. in O'Connor is the preferred approach. As discussed below the expression "interests of justice" must be interpreted in light of the international decisions and in regard to the Bill of Rights as stated in section 6.

96 Above n91.

B Section 138

Section 138 confers a general discretionary power on the Court to make suppression orders and clear the Court.

The approach the New Zealand courts have taken to the exercise of their powers under the Section 138(2) of the Criminal Justice Act and the applicability of the Bill of Rights will be considered. In particular the decisions in O'Connor v Police,[97] R v Keys(No 17)[98] and Police v Accused[99] will be discussed.

Article 14 of the International Covenant provides exceptions to the right to a fair hearing. These exceptions parallel the grounds in section 138(2) as set out above upon which suppression orders can be made. It is submitted that the grounds in section 138(2) which limit the right to freedom of expression are justified in light of Article 14.

It will be concluded that the discretionary powers must be exercised consistently with the rights and freedoms contained in the Bill of Rights in accordance with section 6 of the Bill of Rights. Section 5 should not then be used to limit the right further as the only grounds to limit the right are the ones set out in section 138(2) identified by the legislature as reasonable limits. The Canadian cases which consider the New Zealand equivalent of section 5 will then be considered, as the underlying principles involved will assist in arguing and deciding cases under section 138(2) which turn on the exercise of discretion to prohibit publication.

In O'Connor v Police[100] Thomas J considered the power of the Court to suppress details of a case under section 138(2) of the Criminal Justice Act 1985. In that case Mr O'Connor appealed from the District Court against Rushton DCJ's order prohibiting publication of the proceedings. He was one of thirteen defendants, all members of the anti-abortion group "Operation Rescue", who were charged with

97 Above n37.

98 Above n9.

99 DC, Hamilton, CRN 3019011127, June 1, 1193, Thorburn DCJ.

100 Above n37.

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trespass on an abortion clinic and convicted in the District Court at Otahuhu. When they appeared before Judge Rushton at the first instance a spokesperson asked to speak on behalf of the group. Judge Rushton advised that although she could sit with them as their McKenzie Friend she was not qualified to speak as their advocate. It was made known to Judge Rushton that all thirteen defendants were remaining silent to show that the unborn child does not have a voice. As Judge Rushton was unable to obtain the defendants' express consent to a joint trial the prosecution gave its identical evidence separately against each of the thirteen defendants, all of whom remained silent throughout.

When Judge Rushton gave her decision she imposed a blanket suppression under section 138(2) Criminal Justice Act 1985 prohibiting any publication of the proceedings. Her decision was based on two grounds:

1. that the Court should not be used as a platform for defendants to air their views, or be drawn into a debate on which Parliament has legislated; and
2. the suppression order may be a greater deterrent to re-offending by them than any other sentence.

Mr O'Connor appealed to the High Court against the decision which imposed a blanket suppression order on all details relating to the case. Thomas J allowed the appeal and removed the blanket suppression order relying, inter alia, on section 14 of the Bill of Rights.

The main issue before the High Court was whether the prohibition order could be said to be validly and properly required in the interests of justice. On the facts of the case it was held that the order was not in the "interests of justice". In giving his decision Thomas J relied on section 14 and emphasised:

1. the right of the press to report court proceedings which had a greater right to be present than the right of the public to be present[101]; and

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101 Section 138(3) Criminal Justice Act 1985 which allows accredited news media reporters to remain when the Court is cleared except if it is cleared in the interests of security or defence.

2. the right of the public to receive such reports.[102]

He held that the "right of freedom of expression must be balanced against other rights and interests, including the fundamental public interest in preserving the integrity of justice and the administration of justice"[103].

It is arguable that Thomas J would have reached the same conclusion without the Bill of Rights. However, it is certain that the invocation by Mr O'Connor of sections 14 and 25(a)[104] sharpened the issue before the Court. The concept of open justice is a formidable barrier to courtroom secrecy. The criteria set out in section 138(2) of "interests of justice" do not include deterrence as a valid reason for order under section 138(2).[105] Abuse of court process may be within section 138(2). However in this case an order was not necessary in the interests of justice or to secure proper administration of justice. "[O]nly where the Court's capacity to ensure justice is significantly imperilled will the right of citizens and the media to seek, receive and impart information be curtailed".[106]

It is a rare case where the accused seeks publicity as in O'Connor[107]. More typical is the challenge of a newspaper company to a non-publication order.[108] An application for suppression is usually made by the accused and not opposed by other parties to the proceedings. The arguments tend to arise after the order has been made when the media seek to have the order reviewed. In two recent cases

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102 The dual right of the press to impart information and ideas and the public to receive them was recognised by the European Court of Human Rights in Lingens v Austria (1986) 8 E.H.R.R. 103, para 41.

103 Above n37, 275.

104 The right to a fair and public hearing by an independent and impartial court.

105 Thomas J at the conclusion of his judgment in O'Connor (at p283) sets out the requirements which are to be observed when any order is made under s.138(2) C.J.A.

106 Above n37, 276.

107 Above n37.

108 See decisions discussed below including R v Keys (No. 17), above n9, Police v Accused, above n98 and Re TV3 Network Unreported, 10 May 1993, High Court, Wellington Registry, M 182/93 and the Court of Appeal decision (Unreported, Court of Appeal, 14 June 1993, CA 105/93). The two leading cases Canadian cases are Edmonton Journal v Alberta (A-G), above n3 and Canadian Newspapers Co Ltd v Canada (A-G) (1988) 52 DLR (4th) 690 (SCC).

wide suppression orders were reviewed under section 138(4)(c) after applications were made by vigilant media.[109]

The first was a District Court decision of Thorburn DCJ to impose a blanket suppression order of all details of a conviction. The order has been reviewed by him in response to an application by Radio New Zealand and the Waikato Times. At the time of writing this paper the decision is not available, however it is understood that the order has been reversed and the details published.[110] In that case the defendant had been convicted of an offence under section 131 of the Crimes Act 1961. At sentencing Thorburn DCJ exercised his powers under section 138 and ordered a "general prohibition on publication of anything to do with this particular case." Thorburn DCJ referred to an "even bolder move" before he ordered a blanket suppression.

The reason his Honour gave for the order was:[111]

> [e]ven if there was a report with careful protection of the names and identities of the people involved, then the whole industry in this area no doubt will be agog with gossip as to who it might be, and no doubt I would think there could be more questions raised rightly and/or wrongly or by resort to myth and folklore about the integrity and conduct of all employers and apprentices around here than we would care to think about. That obviously is to be avoided as well and so I will bring a sudden end to the whole issue and make a blanket order prohibiting publication.

The reasons set out in the above quotation for the making of the order, with respect, do not justify the extent of the order. The objective of protecting the name of the victim does not require a blanket order prohibiting publication and the avoidance of gossip is not grounds for a suppression order. Further in Thorburn DCJ's notes on sentencing he notes that the events in issue were consensual and there was no victim impact report before the Court. While the means are rationally connected to the objective, that is to protect the victim by suppressing details which could identify her it does not infringe the right as possible.

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109 An alert media can also prevent orders being made. For example at initial appearance on 2 October 1993 of two accused charged with murder and sexual violation of a doctor and his sister in Foxton an overzealous Registrar attempted ultra vires to clear the Court. A reporter at the "The Dominion" objected and the media were able to remain.

110 The Chief Reporter at "The Dominion" advised that the suppression order had been reversed but a copy of the decision was not available.

111 Above n98, Thorburn DCJ's notes on sentencing at 4.

The second case involved an application by Television New Zealand; R v Keys & Others (No 17)[112] where Williamson J confirmed his acceptance of the explanation of the law given by Thomas J in the case of Police v O'Connor.[113] His Honour made an order under section 138(2) on 6 April 1993[114] forbidding publication of any report or account of the submissions or reasons for his decision on an application to discharge by Marie Keys, Gaye Davidson and Janice Buckingham, co-creche workers of Peter Ellis[115] until after Ellis' trial was completed.

Whether the original order was correct is debatable in light of the Court of Appeal's ruling in R v Shortland[116] (albeit on section 140 not section 138) in which Richardson J. held that section 140 "cannot be utilised to justify imposing a blanket prohibition on the media in support of broad concerns for the fairness in future trials".[117] Also, in O'Connor v Police Thomas J held that under section 138(2) the requirements of an order are that it should be no wider in its terms than is necessary to achieve the due administration of justice, and must be in explicit terms with the reasons for making the order spelt out.[118]

The dicta of the Court of Appeal in Shortland and Thomas J in O'Connor are entirely consistent with section 14 of the Bill of Rights and give the Bill of Rights a purposive interpretation. It seeks to limit the use of suppression orders so that they restrict freedom of expression to give full effect to the Bill of Rights

as little as possible.

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112 Above n9.

113 Above n37.

114 R v Keys (No. 3) Unreported, 6 April 1993, High Court, Christchurch Registry, T 9/93. This order was in one of the many judgments of Williamson J in the criminal proceedings which are often collectively referred to as the "Christchurch creche case".

115 Mr Ellis was charged and found guilty of offenses of sexual violation of children at a creche were all accused worked.

116 Unreported, Court of Appeal, 14 August 1989, CA 243/89.

117 Above n115, 5.

118 Above n37, 283.

Television New Zealand sought an order to allow publication of the relevant submissions and reasons for the decision to discharge three of the women creche workers without conviction some 11 days before the suppression order was due to expire. Television New Zealand relied, inter alia, on section 14 of the Bill of Rights.

When considering the merits of the application Williamson J listed authorities which "confirmed the manner in which Courts have had to balance the rights contained in section 14 of the Bill of Rights Act 1990 with the need to a fair trial in particular circumstances"[119] and made an order discharging the suppression orders.

With respect, in the judgment his Honour seems resigned to the fact that due to the media interest in the trial, interest which Peter Ellis and the three women creche workers had consensually been a part of, it would be unreal or artificial to continue the orders for the protection of Peter Ellis and nothing seemed to turn on section 14. The decision was disappointing, because although relevant authorities were listed, no real consideration was given to them.

It is submitted that the only time suppression orders may be made is on one of the grounds set out in section 138(2) and on such terms, or in its narrowest sense, to infringe the rights in the Bill of Rights as little as possible.

In considering whether the grounds set out in section 138(2) are legitimate grounds for violating a constitutionally protected right or freedom it is necessary to consider Article 14 of the International Covenant, affirmed by section 25(a) of the Bill of Rights. Article 14 of the International Covenant allows exceptions to the principle of open justice and sets out pre-conditions for the suppression of details. It allows the press and the public to be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interests of the private rights of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where the publicity would prejudice the interests of justice. The four exceptions have direct parallels in section 138(2) despite no comment by the New Zealand legislature that section

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119 Above n9, 5 and 6.

138 was intended to implement Article 14. It will be concluded that the ground of public morality alone is not an acceptable objective to make an order under section 138[120] as it is too uncertain and too dependant on the individual judge's view.

While the four grounds in section 138(2) on which an order can be made closely mirror the grounds set out in Article 14(1) of the International Covenant there was no mention of the International Covenant the Introductory Bill. The powers under sections 138 to 140 did not generate comment in the House of Representatives during the parliamentary debates on the Criminal Justice Act.[121]

The grounds on which the court may make powers under section 138(2) give a clear indication of parliament's objective in conferring these powers on the court. The court may make an order only where it is of the opinion that it is required for one or more of the following reasons:

(a) in the interests of justice,

(b) in the interests of public morality,

(c) in the interests of the reputation of any victim of any alleged sexual offence or offence of extortion,

(d) of the security or defence of New Zealand.

The objectives of these powers are the need to ensure justice is done and to protect the right to a fair trial,[122] serving the social interests, such as public morals, proper administration of justice and promotion of access of individuals to justice or effective law enforcement,[123] protecting vulnerable individuals, such as victims of crime, witnesses or the accused,[124] and ensuring that the criminal process is carried out without interference from elements within the court or extraneous influences.[125]

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120 See McGoldrick above n49, 467, and Hertzberg v Finland on "public morals".

121 NZPD Vol 463, 1985:4759-4764; NZPD Vol 465, 1985:6310.

122 See (a) above.

123 See (b) above.

124 See (c) above.

125 See also above n47, 43 on findings of the Canadian courts on objectives purposes which warrant overriding a constitutionally protected right or freedom.

While the international cases are no doubt of persuasive authority[126] it is important to consider the cases in perspective and as discussed above in light of the "margin of discretion". The considerations of Article 14 have mainly involved Uruguay and what are clearly flagrant breaches.[127]

It is submitted that judges are required to exercise their discretion consistently with the Bill of Rights in accordance with section 6. The objective of this interpretation is not to make the Criminal Justice Act consistent with the Bill of Rights as there is a prima facie violation but to make it less inconsistent.

The scope of the grounds of "interests of justice" will impact on the applicability of section 14 of the Bill of Rights. Article 19 of the International Covenant includes "respect of the rights of others". If section 14 is interpreted in line with this, the argument that section 14 should be used to apply pressure to allow publication in Thorburn DCJ's case is arguably weakened. However the "rights of others" includes the right to receive information under section 14. Accordingly it is concluded that "respect of the rights of others" requires that not only parties to the proceedings be considered but the wider general public.

Canada has found statutory provisions conferring power to suppress details about court proceedings although violations of the Charter are justified limitations. The Canadian courts have upheld provisions which suppress information about youth offenders,[128] the names of victims of sexual offenses,[129] and statutory contempt,[130] but was struck down provisions relating to matrimonial cases[131] and search warrants.[132]

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126 R v Butcher and Burgess above n2, 70 per Cooke P.

127 Above n49, para 10.24.

128 Southam Inc v R 34 CR (3d) 27; 141 DLR (3d) 341 (Ont CA) and R v R(T) (no.1) (1984) 10 CCC (3d) 481 (QB).

129 Canadian Newspapers v A-G Canada 52 DLR (4th) 690 (SCC).

130 R v Robinson-Blackmore Printing and Publishing Co Ltd 47 CCC (3d) 366 (Nfld Sup Ct).

131 In Edmonton Journal v Alberta (A-G), above n3 the Court accepted that while the objective was sufficient to warrant overriding a constitutionally protected right the wording of the section was too wide to be a justified limitation.

132 Canadian Newspapers v Canada (A-G) (1986) 31 DLR (4th) 601 (Man Ct QB).

In Edmonton Journal[133] the Supreme Court of Canada struck down a sweeping provincial limitation on media reports concerning matrimonial and other civil cases. The court was unanimous that the section breached section 2(b) and the majority found that it was not a justified limitation.

In Southam Inc v R[134] the Ontario Court of Appeal upheld section 38(1) of the Young Offenders Act RSC 1985 as a reasonable limit on freedom of expression under section 1 of the Charter. Section 38(1) provided for permanent, automatic bans of names of young persons involved in Youth Court proceedings either as accused or witness. The goal of fostering the rehabilitation of young people charged with offenses is a sufficiently important objective and section 38(1) infringes free expression only minimally. A law need not be perfectly designed to be sustained under section 1 of the Charter.

In considering a similar provision the Alberta Court of Appeal in R v R(T)[135] came to the same decision on section 12(3) Juvenile Delinquents Act. However section 12(3) contains an exception in that although the ban is automatic the court can grant special leave to publish, a power which is not contained in section 38(1).

Canadian Newspapers Manitoba Court of Queens Bench struck down section 443(1) of the Criminal Code which prohibits details about search warrants. Section 443(1) has two goals;

(1) protecting the privacy of innocent persons who are the targets of search warrants, and

(2) promoting the effectiveness of police investigations through the suppression of publications which might tip off an investigator's target.

It was held that the objectives were of sufficient importance to warrant overriding a constitutionally protected right and freedom. However the section's sweeping wording bans the publication of more information than is necessary to further its goals.

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133 Above n3.

134 Above n128.

135 Above n128.

The Canadian equivalent of section 138(2) Criminal Justice Act 1985 is section 442(1) of the Criminal Code. The constitutionality of this subsection was considered in R v Lefebvre[136] by the Quebec Court of Appeal. It held that section 11(d) had not rendered inoperative the exceptions in section 442 to the public trial rule. Unhelpfully the court did not refer to either sections 1 or 2(b) of the Charter. The accused unsuccessfully challenged the Court's exclusion of the public from the Court during the evidence of a rape victim who was too nervous to testify in public.

C Sections 139 and 139A

Sections 139 and 139A relate to sexual offenses and impose automatic bans in cases where the sections apply. They are prima facie a greater violation of section 14 of the Bill of Rights than discretionary orders. Equivalent provisions in Canada have with stood a Charter analysis and survived as a justified limitation.[137]

In Re an application by TV3 Network Services Limited[138] Neazor J refused an application by TV3 to permit publication of the names of the daughters of a man convicted on a number of counts of sexual offenses involving them.

Section 139 of the Criminal Justice Act 1985 applied to the case which prevents the publication, in any report or account, relating to the proceedings commenced in the Court in respect of an offence of the kind involved in the case in issue, of the name of the victim or any name or particulars likely to lead to the identification of the victim unless the victim is over 16 and the Court by order permits the publication. No order had been made in this case allowing the publication of any victim's name or any identifying material.

Neazor J held that the power given to the Court by section 139(1) was not intended to be exercised in respect of a particular publication and the detail to be given in that publication. The statutory bar on

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136 (1984) 17 CCC (3d) 277.

137 Canadian Newspapers v A.G. Canada, above n129, in which the Ontario Court of Appeal and the Supreme Court of Canada considered s.442(3) Criminal Code. See discussion of this case above.

138 Above n108.

identification applies to the world, and, consistently with the legislation, any release from that statutory bar must apply to all the world. The section therefore is to be approached on the basis of whether an order should be made which would allow anyone to publish the identifying detail to the extent allowed by the order.

Neazor J's decision was unsuccessfully appealed to the Court of Appeal.[139] However Cooke P in the decision of the Court disagreed with the ruling referred to above. He said:[140]

> The Judge took the view that if publication were permitted to one applicant under s.139(1) it would follow that the information would in effect come into the public domain and all the media would be free to publish it similarly. We are not satisfied that this is the true interpretation of the statute, but for present purposes it is unnecessary to express a final opinion on that point.

Cooke P referred to section 14 of the Bill of Rights but held:

> In the circumstances of the present case freedom of expression is to be subordinated to the public policy indicated by parliament under s.139(2). By virtue of s.4 of the New Zealand Bill of Rights Act the policy must prevail over s.14. We have already mentioned that this is not strictly a s.139(2) case, but the spirit of s.139(2) should be borne in mind in this particular case in exercising the discretion under s.139(1).[141]

Cooke P's obiter comments on this point are in line with the European Committee of Human Rights' decision in Hodgson & Others v United Kingdom.[142] Under Article 10(2) of the Convention, the Commission held that it is permissable to limit the freedom of expression for the purposes, inter alia, of "maintaining the authority ..... of the judiciary". There is no such restriction in Article 19 or section 14. In that case the applicant argued that a prohibition on the proposed method of reporting was not prescribed by law because the trial Judge had no jurisdiction to make an order which was selective in the sense that it was directed against one television programme and concerned with questions of format

139 Above n108.

140 Above n108, 5.

141 Above n108,4.

142 10 E.H.R.R. 503.

as opposed to substance. The Commission did not accept this argument and held that section 4(2) of the Contempt of Court Act 1981.[143]

> empowers a Court, where it appears to be necessary for avoiding a substantial risk of prejudice, to the administration of justice, to order that 'the publication of every report of the proceedings, or any part of the proceedings, be postponed for such period as the Court thinks necessary for that purpose'.

In Canadian Newspapers Co Ltd v AG Canada[144] the Supreme Court of Canada considered section 442(3) of the Criminal Code[145] which provides for mandatory publication bans in particular circumstances. It was held that the overall objective of the publication ban imposed by section 442(3) was to improve the administration of justice by encouraging victims to come forward and complain. A mandatory ban was the only way to provide the necessary assurance for the complainant in sexual offence cases that his or her identity would be protected, and accordingly section 442(3) was justifiable and not a violation of the Charter[146] as it was the only way of achieving this objective[147]. Section 442(3) imposed minimal restrictions on the media rights. Both the Ontario Court of Appeal and the Supreme Court of Canada found that the purpose of the Canadian equivalent of section 139 is to foster the making of complaints by victims of sexual assault. Therefore the publication bans must be automatic otherwise the victim would be uncertain whether the judge would exercise her discretion to impose a ban which defeats the purpose of the section.

D Section 140

Section 140 only grants power to suppress the name of the accused. No grounds are set out in the section which the power can be exercised.

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143 Above n142, 507.

144 Above n129.

145 Similar to section 139 of the Criminal Justice Act 1985.

146 The Ontario Court of Appeal from where this case was being appealed had held that the section was an unjustified limitation and ordered that it be repealed. The Law Reform Commission of Canada agrees with the Court of Appeal's decision. With respect, the decision of the Supreme Court is to be preferred as a mandatory ban is necessary to fulfil its objective.

147 Above n14, para 6.52.

As noted by Heron J in R v Lee and Another:[148]

> It is to be contrasted with the limited powers under section 138 to clear a court or to prohibit a report of the proceedings, as opposed to the identity of the parties to those proceedings. Whilst there is such a power, it is limited as subsection 138(2) provides. Furthermore, those limitations are not in any way supplanted now by the inherent jurisdiction or any rule of law.

Name suppression raises separate issues with regard to freedom of expression and the right to a fair and public hearing. Name suppression plays a role in protecting the right in section 25(c), being the right to be presumed innocent until proven guilty in accordance with law. People with previous convictions for similar offenses which are known to the public, or groups of people who may be associated in the public's view with certain types of offenses, for example members of SPUC and the offence of trespass, may only truly be able to be innocent until proven guilty if their name is suppressed to ensure parity. It is submitted however the court has ways to overcome this problem, such as directions to the jury and the inadmissibility of details of previous convictions.

Section 140 gives the court limited power to suppress the name of the accused or any other person connected with the proceeding. However, this power does not stop the public being present in the courtroom. In one respect the power is illusory as the accused's name is used in court. However considering the number of suppression orders made[149] and the large number of applications which are unsuccessful people charged with offenses obviously feel name suppression has some impact.

There are two main types of cases in which name suppression is sought and tends to be granted under section 140. They are cases involving what is commonly referred to as "white collar" crime and sexual offenses.

Sexual offenses are dealt with separately under sections 139 and 139A and it is submitted that the usual criteria for granting name suppression in these cases are to protect the victim.[150]

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148 Unreported, High Court, Wellington, AP 248/92 and 249/92, 7/10/92, Heron J.

149 See Appendix A.

150 See above for discussion on these cases and the acceptability of mandatory publication bans.

Recent decisions indicate a judicial trend towards not accepting professional standing alone as being justification for ordering name suppression. In the recent oral decision of Gallen J in R v Lee and Edwards,[151] His Honour refused to suppress the names of the two accused: a prominent businessman and a chartered accountant charged with dishonesty charges, including forgery and fraudulent use of documents, together with a common charge of conspiring to obstruct the course of justice.

Gallen J turned first to matters of principle and held that the overriding principle is that the court should be conducted in public as the court is conducting a matter on behalf of the community which has a direct interest and direct involvement. This principle holds despite the risk that if the names are suppressed, others will be suspected and if the accused are ultimately acquitted they nevertheless have to bear a penalty in relation to the charge. They are factors to be taken into account but do not override the basic principle of names of accused being published.

The other principle referred to by Gallen J was that persons in similar situations should be treated with equality and parity but as it is a rule rather than an exception, that names are published Gallen J refused the application for legal aid.

Many other professionals who seek name suppression on the ground that it would seriously affect their business have been unsuccessful including accountants,[152] doctors,[153] business people,[154] TV

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151 Unreported, High Court, Wellington, T 28/93, 19/7/93, Gallen J second oral ruling.

152 Kuegler v R Unreported, High Court, Auckland, AP 75/90, 26/4/90, Gault J in which an accountant was charged with GST fraud and name suppression refused.

153 Yogasakarn v Police, AP 132/88, High Court, Hamilton, 29/8/88, Doogue J in which a doctor was charged with manslaughter and was refused name suppression.

Vasan v Medical Council of New Zealand [1992] 1 NZLR 310 in which a doctor on a charge of professional misconduct had his application for name suppression refused. The appellant sought name suppression pending the hearing of his appeal under s 59 Medical Practitioners Act 1968. Cooke P. in his judgment of the Court held at 311 line 47 ff. "... the practitioner in this case has chosen to bring the matter before this Court, the result of which in the ordinary course is that the media is free to publish his name. Mr Gibson asks for a suppression order as his appeal is yet to be heard. While it is fair to emphasise that the removal of name [from the medical register] is not final but subject to a pending appeal, we do not feel that we would be justified in ordering suppression. There is no applicable statutory power to make such an order and, assuming that the inherent jurisdiction extends so far, it falls to be exercised in the light of the general importance of the principle that the freedom of the press to report Court proceedings fairly and accurately should not be unnecessarily shackled; see for example Broadcasting Corporation of New Zealand v Attorney-General, above n91. The interim suppression order made at the commencement of this morning's hearing is accordingly now discharged."

Gurusinghe v Preliminary Proceedings Committee of the Medical Council of NZ and Another, (unreported, CA 194/88, 5/10/88, Cooke, Somers, Bisson and Barker JJ in which an application for name suppression until the appear was heard was refused. The Medical Council found the appellant guilty of disgraceful conduct. The Court held although name suppression was available in the Court's inherent jurisdiction there was no warrant for exercising it in this case.

154 R v Lee, above n151, in which Mr Lee charged with dishonesty offenses although a prominent businessman and ex-Rhodes Scholar was refused name suppression.

personalities.[155] However in R v Wilson two policemen charged with aggravated assault were granted name suppression[156].

The Court of Appeal considered the interpretation of section 140 in R v Shortland.[157] The Court of Appeal dismissed an appeal from Gallen J's decision to dismiss an appeal against the refusal by Judge Tucker in the District Court at Napier to renew an interim order for suppression of the name of the appellant and any details leading to his identification. In that case[158] the defendant had been charged with murder and the media had made remarks about the defendant's previous convictions for violent offences.

Richardson J delivered the decision of the Court and held:[159]

> The question of law before us is a narrow one. It hinges on the interpretation and application of s.140. ... The section is confined to orders directly or indirectly affecting the identification of an accused. We are satisfied, as both counsel accepted, that the order made by Gallen J. that there be no reference or publicity given to the appellant's past or any material published which is likely to draw attention to any such information, cannot be supported in terms of s.140. This section cannot be utilised to justify imposing a blanket prohibition on the media in support of broad concerns for the fairness in future trials.
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> ... We emphasise that these are not injunction proceedings or contempt proceedings. The Crown and the appellant have the remedies if they are concerned with the integrity of the trial processes.

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155 Roberts v Police (9189) 4 CRNZ 429 involved an appeal by a TV media personality from refusal to grant permanent name suppression in District Court following a discharge pursuant to section 19 of the Criminal Justice Act 1985 for possession of cannabis. Wylie J. dismissed the appeal with a qualification prohibiting publication of the former name of the appellant's wife. Court should not legitimise deception of the public by continuing to present the appellant as a man of unblemished character. He went on to say at 432 "...in one sense at least, this appeal is an attempt to have the Court legitimise a course of deception of that nature and for myself I think that would be entirely inappropriate."

The name suppression was sought under section 140 and Wylie J. concluded at 432 "the whole exercise is in the long run a matter of balancing the respective interests of the appellant and those associated with him, against the undoubted interest of the public in the business of the Court being conducted openly and with an appearance of equality of treatment for all citizens."

156 W v Police (unreported, High Court, Wellington, AP 116/88, 22 July 1988, Heron J.) Application for name suppression by two policemen charged with assault. The case came before the Court as an appeal pursuant to s.115C Summary Proceedings Act 1957. Heron J. noted that name suppression is granted only in exceptional cases with special considerations needing to be made out. The consideration that carried the greatest weight with the Court was that, on the assumption of an acquittal, the publication of the name would forever be an impediment to a serving police officer. In balancing the considerations involved, Court had that there was nothing lost to the public interest by making orders for suppression. The appeal allowed and name suppression ordered. C v Police (unreported, High Court, Wellington, AP 117/88, 22 July 1988, Heron J.)

157 Above n117.

158 The case had already been before the Court of Appeal in Television New Zealand Limited v Solicitor-General [1989] 1 NZLR 1 in which it was there was sufficient ground for an interim injunction restraining publication of details of Shortland. However that case involved a complaint under the Broadcasting Act.

159 Above n117, 4.

IV SUB JUDICE CONTEMPT

There is no overlap between sub judice contempt and the Criminal Justice Act. In contrast with the statutory provisions of the Criminal Justice Act, the application of the Bill of Rights to the common law of sub judice contempt rests on section 5 of the Bill of Rights. Accordingly, the two are considered separately in this paper.

A Sub judice contempt and its purpose

Contempt of court prohibits "any conduct that tends to bring the authority and the administration of the law into disrespect or disregard to or interfere with or prejudice parties, litigants or the witnesses during the litigation."[160] In general terms, words spoken or otherwise published, or acts done, outside court which are intended or likely to interfere with or obstruct the fair administration of justice are punishable as criminal contempt of court.[161]

The rationale of sub judice contempt[162] is to protect the administration of justice in particular cases by prohibiting publication of material likely to prejudice a fair trial, to maintain the effective administration of justice and protect the fairness of the trial process. Further it enables the court to regulate its own process by ensuring that each party receives a fair hearing based solely on the evidence adduced in the court[163] free from outside prejudice which is particularly important when an accused is being tried by a judge and a jury. Fundamental to the fairness of the trial is that justice be

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160 Oswald's Contempt of Court 1910, 3rd edn page 6.

161 9 Halsbury's Laws of England (4th ed) para 7.

162 This paper will only consider the court's power to charge with sub judice (once a trial is pending) contempt. The court also has powers to bring charges for contempt in other situations including scandalising the court which are outside the scope of this paper as once a matter is no longer before the court, or sub judice, the rights protected by section 25(a) do not to exist and the statutory provisions in the Criminal Justice Act, which are the additional method by which details of Court proceedings are suppressed are not applicable. Such wider powers violate the right to freedom of expression but are outside the scope of this paper. It is submitted that any codification of the law of contempt should include all forms of contempt.

163 In a Minute by Robertson J. in North Shore City Council & Ors v Waitemata Electric Power Board & Ors (HC - Auckland, CP 88/93; 12/5/93), he said: "There is, regrettably, a widely held view (as evidenced by the material one hears, sees and reads in the media) that while cases are under consideration, (be they criminal or civil) no restraint is necessary on the part or either the parties or observers. It is not that long since very different conventions persisted ... It is fundamental and axiomatic that every judicial proceeding is determined solely on the basis of evidence presented in Court. But that can be no license for protagonists of a cause to create embarrassment, discomfort, or at times odium for or contempt of others by unrestrained and strident abuse or criticism."

administered impartially, openly and only upon the evidence properly before the court and therefore the court has powers to protect that process. It does not prohibit fair and accurate reports of legal proceedings[164] or criticism of the courts per se.[165] The principle underlying contempt is expressed by Lord Reid in Attorney-General v Times Newspapers Ltd[166]

> The law on this subject is and must be founded entirely on public policy. It is not there to protect the private rights of parties to a litigation or prosecution. It is there to prevent interference with the administration of justice and it should, in my judgment, be limited to what is reasonably necessary for that purpose. Public Policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice.

Sub judice contempt limits freedom of expression. It is submitted that in practice it suppresses more information about court proceedings than it is legally able to under the law of contempt. In the grey areas of contempt, reporters tend to be over-cautious to avoid contempt of court charges, especially in light of the fact that there is no maximum penalty.[167] While contempt of court has been described as "the Proteus of the legal world"[168] and that it unjustly limits freedom of expression it is nevertheless an important safeguard of the right to a fair trial.

In New Zealand the courts have no inherent jurisdiction[169] to punish for contempt, where the Criminal Justice Act[170] applies therefore this paper will not consider the Canadian authorities on the

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164 In England the basic rule whereby a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith, cannot constitute a contempt of Court is restricted by s.4(1) Contempt of Court Act 1981, see Re Central Independent Television plc [1991] 1 All ER 347.

165 It is now well established that concept of contempt does not stop criticism of the courts. Citing with approval the Attorney-General v Leveller Magazine Ltd [1979] AC 440, 499, the High Court in Solicitor-General v Radio New Zealand considered at p6 that "it is justice itself that is flouted by contempt of court, not the individual court or judge attempting to administer it". See also the dicta of Fair J in Attorney-General v Butler [1953] NZLR 944.

166 [1974] AC 273, 294.

167 Essays on Human Rights K J Keith (ed) Chapter 6, A. Quentin-Baxter p.74.

168 C J Miller "Contempt of Court" All ER Annual Review 1992 68. Proteus was a sea-god with the ability to change shape to avoid answering questions.]

169 Compare Taylor v Attorney-General [1975] 2 NZLR 675 (CA) where Woodhouse J. previously doubted in a dissenting judgment whether such a general power existed where it was otherwise covered by statute.

170 Section 138(6) of the Criminal Justice Act.

inherent powers of the court. However common law sub judice contempt offence bans pre-trial publication of information which tends to threaten the administration of justice.

Like the New Zealand and English courts the Canadian courts have used the sub judice doctrine, backed by the power to punish for contempt, to stifle public discussion of civil or criminal cases before the court. Although the doctrine may discourage prejudicial publicity, it can operate to gag free disclosure and comment at the very time when it is likely to be of greatest public interest and benefit.

B Test for Sub Judice Contempt in New Zealand

Sub judice contempt prohibits publication of details of proceedings once a trial is pending until the accused is acquitted or sentenced.[171]

New Zealand has a three stage test[172] for contempt of court:[173]

(1) Was there contempt at all? Does the material complained of have a tendency[174] to interfere with the due administration of justice in the particular proceedings?[175]

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171 For discussion on when a trial is pending see;
(1) TVNZ v Sol-Gen [1989] 1 NZLR 1 at 3 line 8 matter may become sub judice when an arrest is "highly likely".
(2) Miller "Contempt of Court: the Sub Judice Rule" [1968] Crim LR 63, 137,191.
(3) see also R v Jefferies Richardson J. at page 13 of his judgment "when is unreasonableness assessed?"
(4) Man CA (A-G) v Groupe Quebecor [1987] 5 WWR 270, 282.

172 The first two principles were formulated in Hunt v Clarke (1889) 58 LJQB 490 per Lord Reid. The third principle was added by Davision C.J. in Solicitor-General v Broadcasting Corporation of New Zealand [1987] 2 NZLR 100.

173 The test was formulated in Solicitor-General v Broadcasting Corporation of New Zealand above n172 by Davison CJ. where he set out the principles which govern the court's consideration of contempt cases involving interference with the right of fair trial of an accused person.

174 "Tendency" - "a real risk as distinct from a remote possibility that the broadcast items would undermine the public confidence in the administration of justice" Solicitor-General v Radio New Zealand above n188, 11/12.

175 The mens rea element has been considered in Radio New Zealand v Solicitor-General above n174 and Solicitor-General v BCNZ above n172. See also John Fairfax & Sons Pty Ltd v McRae (1955) 93 CLR 351 at 368-369.

(2) Was it sufficiently serious to require or justify the Court in making an order against the respondent?[176]

The test is a "real risk of prejudice to the trial" test[177] with the burden on the applicant to prove beyond reasonable doubt.[178]

(3) Even though the contempt would justify the Court in making an order, is it as a matter of public interest to be excused by the Court? Davison CJ held:[179]

> Even though a contempt has been proved according to law, a Court may yet decide that it should not punish that contempt on grounds of public policy. The law of contempt is founded entirely on public policy and public policy requires the balancing of interests which may conflict. In the realm of contempt there is, on the one hand, the right of an accused person to a fair trial by the Courts and not to have the trial prejudiced by interference from outside sources. On the other hand, the public's right to know, freedom of speech and the freedom of the press should not be limited to any greater extent than is necessary.

England has a statutory defence of public interest in section 5 of the Contempt of Court Act 1981.[180]

C The Approach to the Bill of Rights

The sub judice rule prima facie violates section 14 of the Bill of Rights. The real issue in each case is whether in any given circumstance the contempt is a reasonable limit on freedom of expression

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176 see Attorney-General v Times Newspapers Ltd [1974] AC 273 per Lord Reid at 298 [1973] 3 All E.R. 55; Bell v Stewart (1920) 28 CLR 419,432; John Fairfax & Sons Pty Ltd v McRae above n175,370.

177 See Media and Broadcasting Law (1987) ABLR 301 on four recent Australian decisions on "real and definitive possibility" and generally on the law of contempt as it effects the media. See also the comments of Davison CJ in Solicitor-General v BCNZ above n172 where he said: "the cases indicate that the Courts are more likely to excuse a contempt if the risk of prejudice created by the words is no more than an incidental consequence of expounding the main theme."

178 Solicitor-General v Radio Avon [1978] 1 NZLR 225, 234; J.F. Burrows Media Law: Recent Developments Legal Research Foundation (15/10/92). TVNZ v Solicitor-General [1989] 1 NZLR 1 (C.A.).

179 Above n172,108. compare Morris LJ's comments in Attorney-General v Times Newspapers Limited [1973] 3 All ER 54, 66 line l/j.

180 Section 5 provides:
A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as contempt of court under the strict liability rule if the risk of impediment or prejudice is merely incidental to the discussion.

In Australia there is a common law defence of public interest. See Ex parte Breadmanufacturers (1937) 37 SR (NSW) 242; A-G (Vic) v Derryn Hinch and Macquarie Broadcasting Holdings Ltd Unreported, Sup. Ct (Vic.), No. CC 90.

prescribed by law as can be demonstrably justified in a free and democratic society under section 5 of the Bill of Rights.[181]

Once the accused has raised an evidential onus the onus is on the Crown to prove the three elements of section 5 as found in the wording of the section.

1. Is the common law of sub judice contempt a reasonable limit?

The objective of sub judice contempt, as discussed above, is to protect the administration of justice and protect the fairness of the trial process.

Article 14 of the International Covenant allows the Press and public to be excluded where "in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". Article 19 of the International Covenant allows freedom of expression to be limited for the respect of others. It is submitted this includes others' right to a fair trial. Accordingly it is submitted the exception in Article 19 includes others' right to a fair trial.

Accordingly it is submitted that the law of sub judice contempt is prima facie a reasonable limit on the rights protected by the Bill of Rights.[182]

2. Is the common law of sub judice contempt prescribed by law?

In Sunday Times v United Kingdom[183] the European Court of Human Rights held that the expression "prescribed by law" in Article 10 of the European Convention had two requirements:

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181 Section 5 of the Bill of Rights provides:
Subject to s.4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

182 This view is supported by the decision of the Court in Solicitor-General v Radio New Zealand above n174 where the Court held at page 27 "There is no doubt that the objective of the law of contempt, generally and specifically in this case, is of sufficient importance to warrant the limit of the freedom of expression."

183 2 EHRR 245.

1. the law must be adequately accessible; and
2. the law must be formulated with sufficient precision to enable citizens to regulate their conduct and to reasonably foresee the consequences of their actions.

This test was applied in Solicitor-General v Radio New Zealand[184] and it is submitted this is the applicable test for New Zealand. It is debatable[185] however whether the common law of sub judice contempt in New Zealand is certain enough to pass the above test for "prescribed by law"[186]. In Solicitor-General v Radio New Zealand[187] it was accepted by the Court and counsel that the law of contempt in question, namely the protection of the jury system, is clearly enough prescribed by law. This is only a small category of the common law of contempt in New Zealand. Because of the uncertainty of the law of contempt in practice more ends up being suppressed than the law actually requires[188].

3. Is the particular contempt in issue a limit which is demonstrably justified in a free and democratic society?

The High Court has recently had an opportunity to consider whether the restriction created by the finding of contempt is within such reasonable limits as are set out in section 5 of the Bill of Rights.

In Solicitor-General v Radio New Zealand Limited[189] the Solicitor-General claimed that the defendant committed contempt of Court by causing or permitting one of its reporters, Adam Gifford, contacting the jurors in the murder trial of Mr Tamihere charged with murdering two Swedish tourists

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184 Above n174.

185 Adams on Criminal Law Ch10.6.09. The authors suggest it is prescribed by law. "The limit which contempt law imposes on expression is, although a common law limit, discernible (albeit with legal advice) and so would probably pass the threshold of 'prescribed by law'". The European Court of Human Rights disagree, see Sunday Times v U.K. above n183 (European Court of Human Rights). David Lepofsky when commenting on the decision in R v Robinson-Blackmore above n130 said the definition of contempt in Canada is too vague to be prescribed by law.

186 Above n183.

187 Above n174,27 the Court held "The law of contempt ... in the particular form that applies in this case is clearly enough prescribed and there is no issue taken about that in the arguments of counsel."

188 Rogers "Risk of Contempt" (1991) NZLJ p 283 .

189 above n174.

and for reporting the comments made by the jurors. The case had attracted much publicity, one of the reasons being that Mr Tamihere was charged with murder even though the bodies had not been found. Following his conviction the body of one of the deceased of whom Mr Tamihere had been convicted of murdering was found. Mr Gifford then contacted the jurors to see if in light of the new evidence they would still have convicted Mr Tamihere.

Radio New Zealand was found guilty and fined $20,000 for contempt of Court.

Once the Court had found that the conduct in question had the tendency to prejudice the administration of justice it considered whether the Bill of Rights saves the conduct from being punishable contempt. It found that the right to freedom of expression, expressed in section 14 of the Act, did not encompass the committing of the contempt alleged in this case. It held that the right of freedom to expression must be balanced against all other affirmed rights and freedoms. These include minimum standards of criminal procedure in subsections 25(a) and (c) of the Act. On balance the Court held that the right of freedom of expression is qualified by the necessity to preserve and protect those fundamental elements in the jury system. Freedom of expression does not authorise or permit the conduct of the defendant in that case. The right does not encompass the contempt alleged and found.[190]

The Court went on obiter to consider whether the form of contempt of Court in question creates no more than a justified limitation prescribed in section 5 of the Act. It rightly pointed out that there was no direct authority in New Zealand on this issue. After considering the Canadian tests for the application of section 1 of the Charter it held that in New Zealand the right of freedom of the press is no more and no less than the right of all and any member of the public to make comment. The Court found the decision of the European Court in the Sunday Times[191] case to be of no assistance.

The Court held obiter that the contempt of Court satisfied the section 5 test in that its objective is of sufficient importance to warrant the limiting of the freedom of expression and the form in which it is

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190 Above n174, 20.

191 Above n183.

appropriate and necessary to uphold the administration of justice and to limit the freedom of expression as little as possible.

In R v Chignell and Walker[192] the Court considered whether a general prohibition on the publishing of a statement by or relating to a witness who was not going to be called at the retrial. The Court considered section 14 of the Bill of Rights and ultimately refused to grant the injunction. Robertson J held there is a "need for a clearly contemplated contempt before a Court will consider an injunction which restricts freedom of the press. ... The Crown is ... expressing a concern that ... there is a risk of activity which could undermine a fair trial. In my view, however, that mere risk is insufficient to outweigh the competing consideration".[193]

The importance of section 14 was affirmed and the value of freedom of expression in society.[194] Robertson J's approach of refusing the injunction but indicating "the willingness of the Court to act firmly and decisively if there is comment or activity which is in fact destructive to a fair trial"[195] gives effect to the Bill of Rights. It is submitted that his Honour gave full effect to the rights in the Bill of Rights without jeopardising the right of the accused to a fair trial.

D Canadian Approach

While the Canadian courts have accepted that some statutory publication ban provisions are justifiable it has not viewed the common law powers of contempt of court so favourably. The main criticism has been that it acts as a prior restraint that is not a justifiable limit on freedom of expression.[196]

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192 Above n51.

193 Above n51, 183.

194 Above n51, 184.

195 Above n51, 184.

196 Above n14, 6.39 where Atrens referred to the approach of the House of Lords in the thalidomide case in giving broad scope to the sub judice doctrine in upholding an injunction prohibiting publishing of the article in question and suggested it is inconceivable that such a broad, prior restraint on the freedom of the press could not be justified under the Charter.

The Canadian approach has been to apply the test formulated by the Supreme Court of Canada in R v Oakes[197] which has two limbs, both of which must be proved before a limit is held to be justified under section 1 of the Charter. They are:

1. The objective of the impugned provision is of sufficient importance to justify overriding a constitutionally protected right or freedom; and
2. The means chosen to achieve the objective:

   (a) are rationally connected with the objective and not arbitrary, unfair or based on irrational considerations; and

   (b) must impinge on the right as little as possible.

In R v Robinson-Blackmore Printing and Publishing Co.[198] the Newfoundland Supreme Court held sub judice offence is a reasonable limit on freedom of expression which is saved by section 1. There has been criticism of this decision because it only considered striking down the offence not whether it should be construed more narrowly. Secondly it revamped the definition without acknowledging it by saying the offence required serious risk to the administration of justice. Further it failed to find the definition was so vague it did not meet the section 1 requirement of prescribed by law.[199]

In R v Sophonow,[200] Hall J.A. held[201]:

> Freedom of the press and the right of an accused to a fair trial so expressed are not difficult to reconcile if it is recognised that freedom of the press is not conferred in absolute terms but carries with it the quality of restraint, that is to say the freedom will be exercised reasonably with due regard to the right of an accused person to a fair trial as expressed in section 11(d) of the Charter.

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197 (1986) 26 DLR (4th) 200.

198 Above n130.

199 Above n47, Part I.

200 (No. 2) 150 DLR (3d) 590 (Man CA).

201 Above n200, 590.

He went on to say:

> What is before us is a motion for a blanket order respecting publication of extra-judicial commentary. Such an order is neither practical nor appropriate as it would be tantamount to censorship and is inconsistent with the requirements of a public hearing.
>
> There are adequate safeguards in the Court process to ensure the accused a fair hearing of this appeal and a fair trial when one is ordered. But the media should, for its part, exercise restraint to ensure that those safeguards are not repealed by stories outside the record of the case.

In that case Matars J.A.[202] cited the decision of Boland J in R v Robinson[203] in which he held that prior restraint should be imposed on the press only in extraordinary circumstances.

Matars J.A. went on to say:

> If the Court were to grant an order .... the Court would be acting as a self-appointed censor of the press and would be exercising an unwarranted power of prior restraint. ... It would mean that the Charter, instead of being used as a means for strengthening civil liberties could become a mechanism for restricting fundamental freedoms.

It is submitted that as a general rule a blanket order prohibiting publication is an unjustified prior restraint. The sub judice doctrine and the power to punish for contempt provide adequate safeguards in ensuring that publication does not overstep acceptable boundaries. However due to the vagueness of the uncodified law of contempt the threat of contempt proceedings may indirectly impose prior constraints on the media.

The Manitoba Court of Appeal in Man. (AG) v Groupe Quebecor Inc[204] used the contempt power to punish the media for infringing the sub judice rule without reference to any cases on sections 1 or 2(b) or any other aspect of the Charter. It relied solely on the common law authorities to emphasise the traditional view that freedom of the press is not absolute.

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202 Above n200, 599.

203 5 CCC (3d) 290, 41 O.R. (2d) 764.

204 Above n171.

The Court held that the freedom of the press is circumscribed by the rights of others.[205] This restriction is not a limit prescribed by law, but a limit inherent to the concept of democratic freedom.

In that case the police held a news conference attended by representatives of the media in which the police announced that two men who had been arrested and charged with murder had previous criminal records. The newspaper reported the criminal records of the suspects and were found guilty of contempt for publishing before trial details of the criminal records which tended to prejudice a fair trial. Following the test to establish contempt adopted by Lord Reid in AG v Times Newspaper Ltd[206] that "there must be a real risk [of prejudicing the trial] as opposed to a remote possibility the publication of the criminal records was enough to justify contempt".

The willingness in this case to resort to the contempt power to restrict the freedom of the press contrasts sharply with the American reluctance to use the contempt power in a similar situation.[207]

In Banville[208] an order was made banning publication of the proceedings at preliminary enquiry until the accused is discharged or a trial completed under section 467(1) of the Criminal Code. This decision has been criticised[209] for placing too light a burden on those who rely on section 1 to limit freedom of expression in the interests of a fair trial rather than considering alternative procedures that would protect the fairness of the trial without infringing section 2(b) freedom. American authorities, by way of contrast, have been loathe to limit freedom of expression in the interests of preserving a fair trial, preferring instead to seek other means of preserving the fairness of a trial process, for example, change of venue, questioning jurors and challenges for cause to ascertain whether they have been affected by

205 Above n171, 285.

206 Above n179.

207 See Bridges v California above n30.

208 (1983) 3 CCC (3d) 312.

209 34 CR (3d) 63, 69 where Lepofsky said "Perhaps the most defective aspect of Banville was the haste and zeal with which the court chose to grant fair trial precedence over free expression. Both of these values are cornerstones of a democratic society. A Canadian court, committed to the principle of judicial self-restraint and opposed to judicial activism, ought to be uneasy about choosing priority from between them. The court should devote substantial energy towards the objective of safe-guarding both free speech and fair trial, and not towards summarily subordinating either."

the publicity, sequestering the jury to isolate it from out of court information or comment, or giving proper instructions as to matters heard outside the court.

Once a decision has been made that the matter is not to be tried by a jury it is suggested that there are not grounds to authorise any limitation on freedom of expression as a professional judiciary should not require restrictions on publicity to guarantee its impartiality.

The greatest obstacle faced by one who bears the section 1 onus is to prove that the means chosen to limit freedom of access or expression are reasonable and demonstrably justified.

E Conclusion

It is concluded that New Zealand should clarify the law of contempt preferably by codification but otherwise by a tightening of the common law. A public interest defence equivalent to section 5 Contempt of Court Act in England or the Australia common law test in Hinch[210] should be specifically part of the law in New Zealand.

The law of contempt must be ascertainable and accessible to meet the necessary test of "prescribed by law". After European Court of Human Rights decision in Sunday Times[211] holding English law on contempt not certain enough to be prescribed by law, England codified its law of contempt see Contempt of Court Act. It is debatable whether the law actually infringes England's international obligations any less.[212]

210 Above n180.

211 Above 183.

212 C J Miller "Contempt of Court" All ER Annual Review 68 "... there remains considerable uncertainty as to [contempt of court's] scope. Regrettably, such uncertainty has survived the Contempt of Court Act 1981 in which Parliament had the opportunity to stake out the borderline between the competing demands of a fair trial and a free press".

V CONCLUSION

Freedom of expression and fair trials are both integral components of a democracy. One right should not be sacrificed for the sake of the other. The court must strive to find a way to ensure each is protected.

The Criminal Justice Act and the law of sub judice contempt play an important role in protecting the fairness of the trial process. They suppress information and accordingly, they prima facie violate the right to freedom of expression in the Bill of Rights. The rights protected by the Bill of Rights must be considered before any information about court proceedings is suppressed or the courts cleared. Any limit must be shown to be justified.

It is concluded that the statutory provisions of the Criminal Justice Act provide sufficiently justifiable grounds on which a discretion to suppress may be exercised. That discretion must be exercised in a way consistent with the Bill of Rights. The courts must find a way to protect the integrity of the trial process while limiting freedom of expression to the least extent possible. Alternatives to suppression orders are available to the courts and these should be used wherever practicable.

The scope of the common law of sub judice contempt has a wide ambit which extends beyond its intended scope to suppress more information than is justifiable under the Bill of Rights. Not only is its scope too wide but the law is too uncertain to be "prescribed by law" as required. The law of contempt in New Zealand should be made certain, either by codification or modification by the common law, to ensure that New Zealand fulfils its international obligations in protecting fundamental rights and freedoms.

The Criminal Justice Act and the common law of sub judice contempt are vital to the protection of the right to a fair hearing by an independent and impartial court. However they are exceptions to the general principles of open justice and freedom of expression. Freedom of expression is a significant hurdle to overcome before the courts should exercise their powers to suppress or punish for contempt.

Sub judice contempt and suppression orders should be used only in a way which limits freedom of expression as little as possible.

APPENDIX A

TYPE OF OFFENCE AND FINAL COURT FOR CASES INVOLVING NAME SUPPRESSION IN 1992

Type of Offence	Final Court		
	Youth	District	High
Manslaughter	0	0	1
Attempted Murder	0	1	0
Rape	0	14	18
Unlawful Sexual Connection	0	12	25
Attempted Sexual Violation	0	2	3
Indecent Assault	0	76	10
Aggravated Burglary	0	1	0
Aggravated Robbery	0	1	1
Injure or Wound	0	4	1
Aggravated Assault	0	5	0
Other Assault	0	169	1
Other Violence Offence	0	12	3
Incest	0	5	3
Other Sexual (Non-violent)	0	38	4
Resisting/Obstructing	0	9	0
Threatening/Intimidation	0	5	0
Other Offence Against Persons	0	4	1
Burglary	1	25	0
Theft	0	322	0
Receiving	0	24	0
Conversion/Unlawful Taking	0	13	0
Fraud/Forgery/False Pretences	0	64	0
Arson	0	2	0
Wilful Damage	0	41	0
Other Property Offence	0	12	0
Use Cannabis	0	46	0
Use Other Drug	0	4	0
Deal in Cannabis	0	26	0
Deal in Other Drug	0	1	5
Other Drug Offence	1	4	0
Other Offence Against Justice	0	17	0
Possess Offensive Weapon	0	14	0
Disorderly Behaviour	0	36	0
Other Good Order Offence	0	14	0
Drive Causing Death	0	1	0
Drive Causing Injury	0	2	0
Drive With Excess Alcohol	0	10	0
Drive While Disqualified	0	6	0
Other Traffic Offence	0	12	0
Miscellaneous Offence	0	72	0
Total	2	1126	76

APPENDIX B

Criminal Justice Act 1985

Section 138. Power to clear Court and forbid report of proceedings -

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

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

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

(i) The evidence adduced; or

(ii) The submissions made:

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

(c) Subject to subsection (3) of this section, an order excluding all or any persons other than the informant, any 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 the power to make any order of any such kind except in accordance with this section or any other enactment.

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

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

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

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

Section 139. Prohibition against publication of names in specified sexual cases -

(1) No person shall publish, in any report or account relating to any proceedings commenced in any court in respect of any offence against any of the sections 128 to 142A of the Crimes Act 1961, 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.

(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.

(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.

Section 139A. Protection of identity of children called as witnesses in criminal proceedings -

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

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

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

(a) In the case of an individual, to imprisonment for a term not exceeding 3 months or to a fine not exceeding $1,000:
(b) In the case of a body corporate, to a fine not exceeding $5,000.

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.

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