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WHAT'S IN A NAME? NAME SUPPRESSION AND THE NEED FOR PUBLIC INTEREST

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ABSTRACT

The application of name suppression law has often been controversial, and this controversy was evident in the cases of Victim X, the All Black who assaulted his wife and also the "white-collar drug-ring". New Zealand's approach to suppression law is premised on the fundamental importance of the principle of openness, and requires "compelling reasons" in order depart from the presumption in favour of publication. Due to the significance of the principle of openness under the current approach to suppression law, little weight is accorded to the fact that the applicant is a victim, or an accused, rather than a convicted person.

This paper explores the validity of this principle as a justification for the presumption in favour of publication. It is argued that the principle of openness is an inadequate justification for the current approach to suppression law. It is also argued that the failure to distinguish between different types of applicants is not justifiable. Further, it is argued that the current approach cannot be justified by recourse to the commonly cited principles, nor any other factors. The only adequate justification for denying an applicant name suppression is where the decision is made based on public interest. It is important however, that where a decision is based on public interest, that public interest is distinguished from public prurience.

This paper advocates that decisions made on name suppression applications are made based on public interest and that these decisions take into account the role that the applicant plays in the proceedings. It is in the interests of justice, and importantly in the public interest that such an approach is taken.

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Name suppression- Public interest- Open Justice

I INTRODUCTION

The issue of name suppression has created controversy in recent years, and the inconsistent application of suppression law has been the cause of much criticism. This paper seeks to explore the causes of the controversy in regards to name suppression, with the purpose of determining whether change is required to the approach taken to decisions regarding name suppression and to the principles guiding those decisions.

The legal basis for the making of suppression orders is discussed, with particular reference to the authoritative court decisions that guide the determination of applications for suppression orders. Although suppression orders can be made to encompass witnesses, victims, convicted persons, accused persons or any other person connected with the criminal proceedings, the particular focus of the paper is on offenders, alleged and convicted, and victims of offences. The principles guiding decisions regarding name suppression are then discussed.

Once the legal principles behind suppression orders have been explored, this paper examines the controversial cases of Victim X and the All Black that assaulted his wife. The decision to grant name suppression to the former sporting celebrities embroiled in the "white-collar drug-ring" is also discussed as it raises interesting issues. The merits of these cases and the issues provoked by them are then discussed in order to determine whether the cases were decided correctly and whether the principles guiding the decisions were correct. It is argued that the All Black case was wrongly decided under current law, but for the right reasons, and that the Victim X case was correctly decided but for the wrong reasons. Additionally it is argued that the decision to give name suppression to the sports stars was justifiable, but the fact that it was not justified, as no reasons were given to support the decision makes it a questionable decision.

As these cases highlight some problems with the operation of suppression law, the next section of the paper discusses whether the presumption in favour of publication is justifiable. In particular, the notion that justice has to be seen to be

done is examined, as although there is merit to the aphorism, and this paper does not question the validity of the principle of open justice, it does not necessarily provide justification for the presumption against name suppression. In examining whether the presumption in favour of publication is justifiable the paper also considers whether the courts have made an appropriate distinction between public interest and public prurience, as public interest may often be the basis for denying name suppression applications. Relating to these issues is a consideration of whether there should be a "special echelon for privileged people",[1] in terms of more readily allowing applications for name suppression that emanate from public figures.

As the current application of the law regarding suppression orders has been exposed as problematic the paper also considers possible options for reform. It is the argument of the paper that the principles guiding suppression order decisions are misplaced and are in need of reconsideration. Where naming the offender or alleged offender does not serve any end of justice, then ostensibly there is no justification for the publication of their name, so a suppression order should not be opposed. It is unfair and unjustifiable that the same considerations apply to a victim applying for a suppression order as to a convicted person.

In this regard the recommendation of the Law Commission to amend the test that applies to victims who apply for name suppression is meritorious and would serve to remedy the current injustice. However, this paper alternatively advocates for the insertion of a new section 140A into the Criminal Justice Act 1985 (the Act). The approach mandated by section 140A would ensure that decisions regarding name suppression applications are justifiable in the public interest, and also ensure that appropriate weight is given to the applicant's role in the proceedings. For what is important is that the ends of justice, and importantly the public interest, are served.

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[1] *R v Procktor* [1997] 1 NZLR 295, 299-300 (CA) Thomas J quoting the lower Court.

II SUPPRESSION ORDERS

A The Criminal Justice Act 1985

Section 140 of the Act gives the Court the power to make an order suppressing the publication of the name, address or occupation of a person accused or convicted of an offence, or of any other person connected with those proceedings. [2] It is clear that "any other person connected with those proceedings" extends to victims as well as offenders. An order made under section 140 may be given temporary or permanent effect,[3] and any breach of this section is liable on summary conviction to a fine of up to $1000.[4] However, when making an order permanently suppressing the name of an offender the court must take into account the views of the victim of the offence. [5] The provisions allowing the court to make an order suppressing the particulars of the offender are generally permissive and offer no guidance as to when such an order should be made. However, the principles guiding the making of suppression orders can be readily deduced with reference to leading decisions of the court.

B The Principles of Section 140

R v Liddell is regarded as the authority in New Zealand of when an order suppressing the name of an offender can be made.[6] *R v Liddell* was not however considered to be an appropriate case for the making of a suppression order, and Cooke P even found that there were positive public interest reasons pointing to disclosure.[7] The positive public interest reasons, which are common to many situations, were that publishing the offender's name might lead to more possible victims coming forward, and that publishing the offender's name mitigated the risk of future offending by making the identity of the offender known. Other potentially relevant public interest factors mentioned in the leading decisions are

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[2] Criminal Justice Act 1985, s 140(1).
[3] Criminal Justice Act 1985, s 140(2).
[4] Criminal Justice Act 1985, s 140(5).
[5] Criminal Justice Act 1985, s 140(4A).
[6] *R v Liddell* [1995] 1 NZLR 538 (CA). See also *R v Procktor* [1997] 1 NZLR 295 (CA).
[7] *R v Liddell* [1995] 1 NZLR 538, 547 (CA) Cooke P for the Court.

that the failure to name the accused can lead suspicion to fall on others,[8] especially when the profession of the accused has been published, and also that publication allows members of the public to form their own decisions about people rather than have those decisions made for them by the court.[9] This may be particularly important pre-trial where the accused has dealings with the public, as the accused is still entitled to conduct their business as per usual. "[I]f name suppression is granted and the appellant is ultimately convicted, clients could quite rightly say that they were denied relevant information."[10] So, in denying an application for name suppression the Court is allowing members of the public to make their own assessment on whether they choose to use the accused's services.

Cooke P stated that when considering whether a suppression order should be made pursuant to section 140 of the Act:[11]

> [T]he starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as 'surrogates of the public'.

Cooke P noted that although the Court has jurisdiction to make a suppression order even in the most serious of cases, such jurisdiction should be exercised with the "utmost caution" and would rarely be exercised on the basis of the interests of the offender's family.[12] Although Cooke P acknowledged the importance of privacy and other interests of the offender's family, he identified these interests as common to most situations in which suppression orders are sought and noted that they will rarely be enough to displace the weighty presumption in favour of openness.[13] This presumption was not displaced in *R v Liddell*, even though, according to a psychiatrist and work associates of the accused's wife, '[p]ublication could well, if not destroy her, [the accused's wife] knock her down so hard that she wouldn't be able to help herself or her sons any

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[8] *Police v M* (March 5 2002) HC A 9/02.
[9] *M v Police* (2 April 2004) HC HAM AP 419/ 4019, Venning J.
[10] *M v Police* (2 April 2004) HC HAM AP 419/ 4019, Venning J.
[11] *R v Liddell* [1995] 1 NZLR 538, 546 (CA) Cooke P for the Court.
[12] *R v Liddell* [1995] 1 NZLR 538, 547 (CA) Cooke P for the Court.
[13] *R v Liddell* [1995] 1 NZLR 538, 547 (CA) Cooke P for the Court.

longer'.[14] This illustrates how high the threshold for displacing the presumption is.

In determining how section 140 of the Act should be applied Cooke P considered that it would be inappropriate to set out any kind of "fettering code".[15] However, his Honour did emphasise the fact that when a Judge is considering whether to grant a suppression order pursuant to section 140 of the Act there is a prima facie presumption in favour of openness.[16]

Factors that are to be weighed when considering an application under section 140 of the Act include, but are not limited to, whether the accused is convicted or acquitted, the seriousness of the offending, the adverse impact publication is likely to have on the offender's rehabilitation, the public interest in knowing the name of the offender, and circumstances personal to the offender.[17] If a decision regarding suppression is being determined prior to a verdict being given, there is the additional factor of the presumption of innocence that has to be considered, although this factor alone is insufficient to displace the presumption of publication.[18] However, it must be remembered that section 140 of the Act allows for a temporary suppression order to be made.[19]

The decision of *R v Liddell* is important as it highlights the importance of the principles of freedom of speech and openness of judicial proceedings, and the decision stands as authority for the weighty presumption in favour of reporting. Subsequent authorities have mandated that "compelling reasons" or "very special circumstances" need to be present in order to justify departure from the principle of open justice.[20]

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[14] *R v Liddell* [1995] 1 NZLR 538, 544 (CA) Cooke P for the Court.
[15] *R v Liddell* [1995] 1 NZLR 538, 547 (CA) Cooke P for the Court.
[16] *R v Liddell* [1995] 1 NZLR 538, 547 (CA) Cooke P for the Court.
[17] As summarised in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, para 42 (CA) Elias CJ for the Court.
[18] *R v Procktor* [1997] 1 NZLR 295, 297 (CA) Thomas J for the Court.
[19] Criminal Justice Act 1985, s 140(2).
[20] See for example *Re Victim X* [2003] 3 NZLR 220, para 18 (HC) Hammond J and *Re Victim X* [2003] 3 NZLR 230, para 36 (CA) Keith J for the Court.

R v Liddell is also authority for the proposition that members of the offender's family constitute "any other person connected with the proceedings" for the purpose of section 140 of the Act, thereby giving the court jurisdiction to make an order suppressing the particulars of the offender's family.[21] Victims of offences can be the subject of section 140 orders; however the names of victims of sexual offences are automatically suppressed.[22] The decision in *R v Liddell* also touches on the jurisdictional issue of the appealability of suppression orders. Cooke P found that the term "sentence", as contained in section 379 of the Crimes Act 1961, includes "any order of the Court made on conviction", hence giving the court jurisdiction to hear an appeal against the granting of a suppression order when it is an order made on conviction.[23] When a suppression order is made it is a well-established principle that the reasons for the suppression order should be explained.[24]

Another point that is made clear by the authorities, although not apparent from its application, is that the decision to make a suppression order should not be made on the basis of a person's wealth or standing in society, without evidence of "special harm" occurring to the applicant through the publicity that would occur if they were to be named.[25] This point is made in *R v Procktor*, where it was stated that, "[o]ne must be careful to avoid creating a special echelon of privileged persons in the community who will enjoy suppression where their less fortunate compatriots would not."[26]

The discretional application of section 140 of the Act should seemingly then be quite straightforward. There is a strong presumption in favour of openness and reporting, and exceptional circumstances are required to displace this presumption. Where there is doubt the scales should surely be tipped in favour of reporting, and only in rare cases will a permanent name suppression

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[21] *R v Liddell* [1995] 1 NZLR 538, 546 (CA) Cooke P for the Court.
[22] Criminal Justice Act 1985, s 139.
[23] *R v Liddell* [1995] 1 NZLR 538, 544 (CA) Cooke P for the Court. Interesting jurisdictional issues have arisen in other cases involving appeals against suppression orders made under section 140 of the Act but have not been examined for the purpose of this paper, see generally *Re Victim X* [2003] 3 NZLR 230 (CA) and *R v B* (21 April 2005) CA 4/05.
[24] *Broadcasting Corporation of New Zealand v Attorney General* [1982] 1 NZLR 120 (CA) 123.
[25] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, para 67 (CA) Elias CJ for the Court.
[26] *R v Procktor* [1997] 1 NZLR 295, 299-300 (CA) Thomas J quoting the lower Court.

order be made. This discretional application has however come under scrutiny in the media in recent years. This paper now examines three cases contributing to the controversy that section 140 and the application of this section has caused. In discussing these cases the approach taken by the ourt in the respective cases is questioned, and the policy guiding their decisions is examined.

III RECENT EXAMPLES OF CONTROVERSIAL SUPPRESSION CASES

A The All Black

In October 2004 a domestic incident occurred, which involved an All Black assaulting his wife. The All Black, who pleaded guilty to assaulting his wife, was discharged without conviction in the Waitakere Family Violence Court after agreeing to undergo counselling.[27] The All Black was granted permanent name suppression. The granting of name suppression created quite a furore in many circles. Women's refuge and domestic violence groups vented their outrage through the media at the decision to grant name suppression, stating that perpetrators of domestic violence need to be named.[28] Constitutional law expert Professor Bill Hodge stated that the decision gives the impression that different law applies to different levels of people in society, and that the granting of name suppression takes the truth away from the courtroom.[29]

According to media reports, Judge Recordon acknowledged that well-known people have no more immunity to publication than any other person does; however he found circumstances justifying permanent name suppression.[30] The Judge reportedly held that revealing the All Black's name would have an enormous effect on his family, career and life. Hence permanent name

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[27] Amanda Spratt "Assault All Black's Name Revealed on Net" *The New Zealand Herald* Auckland.
[28] "Anger at All Black Suppression" (December 10 2004) <http://www.tvnz.co.nz> (last accessed 9 June 2005).
[29] "All Black discharged for Wife Assault" (February 23 2005) <http://www.tvnz.co.nz> (last accessed 9 June 2005).
[30] "Anger at All Black Suppression" (December 10 2004) <http://www.tvnz.co.nz> (last accessed 9 June 2005).

suppression was justified.[31] Of these factors it appears that the likely effect on the family was a weighty factor relied upon in making the suppression order. Also, that the victim in this case was his wife no doubt added weight to the claim that the All Black's name should be suppressed.

The decision to grant name suppression to the All Black does not appear to sit well with the decision in *R v Liddell*, where psychiatric evidence claiming that publication would cause the accused's wife to break down was not enough to displace the presumption in favour of openness. Nor does it sit well with the decision in *Re Victim X*,[32] where the victim's wishes regarding name suppression were seemingly overruled by "public interest".

The only "very special circumstances" present in this case appear to be the fact that the accused is an All Black. This in itself cannot justify a suppression order though, as this is tantamount to "creating a special echelon of privileged persons in the community who will enjoy suppression".[33] It is interesting to note that this occasion was only the second time in that Court's (the Waitakere Family Violence Court) history that a permanent name suppression order was made. The other suppression order made was for another New Zealand rugby player.[34] This creates the appearance of a "special echelon", despite the authority expressly forbidding such an approach.

There is an obvious difference between this case and that of *R v Liddell* though. The All Black's assault on his wife did not constitute a serious assault (although this point is debatable in a society where domestic violence in itself is very serious), whereas the accused in *R v Liddell* was a proven paedophile convicted of indecent assault and sodomy. The argument following on from that point is that as the All Black's offence is not very serious the detrimental effects flowing from the publication of his name would be disproportionate to the offence. This reasoning does make sense, and ostensibly forms the basis of Judge

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[31] "All Black Discharged for Wife Assault" (February 23 2005) <http://www.tvnz.co.nz> (last accessed 9 June 2005).
[32] *Re Victim X* [2003] 3 NZLR 220, discussed below.
[33] *R v Procktor* [1997] 1 NZLR 295, 299-300 (CA) Thomas J quoting the lower court.
[34] "Anger at All Black Suppression" (December 10 2004) <http://www.tvnz.co.nz> (last accessed 9 June 2005).

Recordon's decision; however it is not necessarily the only, nor the best approach. There is a valid argument that, if the offence is not serious enough to warrant censure from the legal system, because he was discharged without conviction, how can it be considered serious enough to justify the protection of his reputation through name suppression?[35] Whilst the lack of seriousness may have been a persuasive factor for Judge Recordon in granting the suppression order, it does not necessarily constitute the best justification for the order.

There are no positive public interest reasons favouring disclosure of the All Black's name as there were in *R v Liddell*, except perhaps that failure to name the All Black could lead to suspicion falling on others.[36] That aside, there is no pertinent reason to require the All Black's name to be published, and as such the suppression order appears correct and fair. However it does not sit well with the fundamental principles of openness, freedom of speech and the weighty presumption in favour of reporting.

Remembering that the starting point is a presumption in favour of reporting, and that exceptional circumstances are required to displace this presumption, the decision to grant the All Black permanent name suppression, whilst perhaps correct in terms of fairness, is irreconcilable with authority on section 140 of the Act. The effect on the family could hardly be characterised as exceptional, as anguish to the family of an offender is relatively commonplace. As the victim in this case was part of the offender's family, it is arguable that Judge Recordon's decision was correct in law. However the authoritative case of *Re Victim X* strongly suggests that Judge Recordon erred in his approach,[37] as in *Re Victim X* it was stated that the private interests of victims would not generally outweigh the principle of open justice,[38] and as such are generally insufficient to warrant the granting of a suppression order. With this dictum in mind, the

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[35] Richard Davis "Name Suppression: More Harm Than Good?" <http://www.casi.org.nz> (last accessed 31 May 2005). Davis was criticising the District Court Judge that granted name suppression to Peter Lewis, a billionaire who pleaded guilty to charges of importation of Class B and Class C drugs.

[36] This was the justification for rescinding a suppression order in *Police v M* (March 5 2002) HC 9/02.

[37] *Re Victim X* [2003] 3 NZLR 220 (HC) Hammond J.

[38] *Re Victim X* [2003] 3 NZLR 220, para 48 (HC) Hammond J.

decision to grant the All Black permanent name suppression is not supported by authority.

When looking at the decision in light of the authorities on section 140 of the Act, it is possible, or perhaps even probable, that Judge Recordon made the wrong decision. But is there really anything wrong with the decision? The case arguably diminishes the importance of the principle of openness - justice cannot be seen to be done if the public do not know who the offender is. But as there is no legitimate public interest justification (unless nosiness is a legitimate public interest factor) for publishing his name, this limitation, if it is a limitation, on the principle should be considered acceptable. Arguably nosiness does constitute a relevant factor though, if the dictum of Hammond J is applied: "the public is entitled to know and form their own views on what happened".[39] The decision in the All Black case highlights the need to reconsider the guiding principles relating to suppression orders, as present inconsistencies and questionable decisions may lead to the justice system being criticised.

The All Black case is a rare example of a successful application for permanent name suppression, which has predictably been subject to considerable criticism. This paper now considers another interesting issue in the context of name suppression, which arises where it is the victim who seeks to have their identity suppressed.

B Victim X

In July 2002 the police uncovered an elaborate plan of three men to kidnap and hold for ransom a wealthy Wellington businessman. Initially the name of the intended victim was suppressed, but the suppression order was later overturned as it was held that the private interest of the intended victim did not outweigh the principles of openness and freedom of speech. Interest in knowing the identity was high, and the Court eventually lifted its initial suppression order and identified the intended victim as William Trotter. This case raises issues

[39] *Re Victim X* [2003] 3 NZLR 220, para 38 (HC) Hammond J.

distinct from that of the All Black and the accused in *R v Liddell*, as the victim was in no way at fault and understandably wanted to keep his identity secret. The High Court and Court of Appeal found that the private interests of victims would not usually outweigh the principle of open justice.[40]

Circumstances, both in terms of Trotter's life and in terms of the trial against those accused of conspiring to kidnap, had changed between the granting of name suppression and the decision to lift the suppression order. At the time of the initial order, Mr X's wife was five months pregnant, and the possible effect on the pregnancy of the stress of publication was a major justification for the suppression order. The safe delivery of the child removed this justification. The fact that it was unlikely that Mr X would testify at the trial of the alleged conspiring kidnappers and that it is mandatory to take the victim's views into account were other factors supporting the suppression of Mr X's name.[41]

Apart from the impact that public identification would have on the daily life of Mr X and his family, there was no other reason that supported the continuation of the suppression order. [42] Whilst Hammond J repeatedly acknowledged that Mr X and his family were in no way at fault, he concluded that their private interests were insufficient to displace the weighty presumption in favour of openness. A decision as to whether a suppression order should be made for a victim as opposed to an offender requires the same considerations and the application of the same principles.[43] Hammond J noted that Parliament had recently legislated to give victims of offences more consideration and they "drew the line where they did." [44] Hammond J therefore considered that it was inappropriate to give different considerations to victims of offences as it was open for the legislature to dictate that approach, but they did not, hence it was inappropriate for the court to go further than Parliament had. Whilst Hammond

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[40] *Re Victim X* [2003] 3 NZLR 220, para 48 (HC) Hammond J and *Re Victim X* [2003] 3 NZLR 230, para 36 (CA) Keith J for the Court.
[41] *Re Victim X* [2003] 3 NZLR 220, para 4 (HC) Hammond J.
[42] *Re Victim X* [2003] 3 NZLR 220, para 44 (HC) Hammond J.
[43] *Re Victim X* [2003] 3 NZLR 220, para 34 (HC) Hammond J.
[44] *Re Victim X* [2003] 3 NZLR 220, para 42 (HC) Hammond J in reference to the Victims' Rights Act 2002.

J's decision is correct in law it appears to be wrong in principle, as it is arguably not right that victims and offenders are subject to the same considerations.

The importance of the principle of openness was reaffirmed in the case of Mr X, but the case begs the question - should the private interests of victims be treated differently from the privacy interests of offenders?

The importance of the principle of openness is often justified on the basis that justice must be seen to be done, and also to ensure that justice is done. Grant Slevin has stated that the paramount purpose of publicity is to ensure that justice is done.[45] This is perhaps true when it comes to the naming and public trial of offenders, but this same justification is not applicable to innocent victims. However, it was the very justification relied upon by Hammond J, in emphasising the rarity of kidnappings in New Zealand and the accompanying public curiosity.[46] His Honour stated that "the public is entitled to know and form its own views on what happened", and that this can only properly be done in a public forum.[47] Hammond J, despite acknowledging that there exists a degree of prurience on the part of some people, nevertheless decided to fuel that prurience by discontinuing the suppression order.[48] Hammond J ostensibly failed to make an important distinction. His Honour equated the fact that the public is interested with the concept of public interest, which surely are entirely different concepts. This argument is developed in more detail when the paper considers whether the presumption against suppression is justifiable.

Whilst the decision to deny Mr X name suppression is undoubtedly in accordance with the principles set down to guide decisions on suppression orders, it is not fair that an innocent victim is subject to the same considerations as offenders. That justice must be seen to be done is not appropriate as a justification for the naming of victims who wish to keep their identity hidden. Nor is the "right" of the public to know in order to form their own views, as surely people could form their own views without knowing the victim's name.

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[45] Grant Slevin "Name Suppression" [2004] NZLJ 223, 223.
[46] *Re Victim X* [2003] 3 NZLR 220, para 38 (HC) Hammond J.
[47] *Re Victim X* [2003] 3 NZLR 220, para 38 (HC) Hammond J.
[48] *Re Victim X* [2003] 3 NZLR 220, para 38 (HC) Hammond J.

The private interests of victims surely warrant more recognition than just being an important factor when it comes to determining an application for suppression. Perhaps a different test entirely would be appropriate. This is discussed further when the paper considers options for reforming suppression law.

The present situation, where victims and offenders are subject to the same considerations when an application for a name suppression order is being determined should be reconsidered as it is not fair to victims and it appears that the same justifications cannot be applied. This paper now discusses another well-publicised suppression order before considering the justifications for publication and possibilities for reform.

C Sports Stars Drug Case

On July 19 2005 a "white-collar drug-ring" was uncovered and the names of 10 people allegedly associated with this ring were suppressed.[49] Two of the names suppressed are those of two former TV sports stars.[50] Interesting issues arise from the decision to grant name suppression in this case. On the face of it, the decision to grant name suppression to the sports stars is justifiable, (at least until they were charged), but the circumstances surrounding the suppression make the order questionable.

Name suppression was granted in this case without the Judge hearing any arguments as to why the names should be suppressed. Further, Judge Everitt initially made the suppression order, no reasons were published in support of his suppression order. The order could presumably be easily justified but, because it was, the respectability of the order is questionable. Although there is no strict rule stating that reasons must be given, it is important that reasons are given.[51] It is important to recognise that reasons cannot be given in every instance where a suppression order is made though, as in some cases the reasons supporting a

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[49] David McLoughlin "Celebrities snared in a tangled web" (July 30 2005) *The Dominion Post* Wellington A14.
[50] David McLoughlin "Celebrities snared in a tangled web" (July 30 2005) *The Dominion Post* Wellington A14.
[51] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, para 79 (CA) Elias CJ for the court.

suppression order may necessarily identify the person covered by a the suppression order. This reasoning is clearly not applicable here as the professions were publishable, meaning that there was no great veil of secrecy. The giving of reasons makes it possible to understand why the judicial authority has been exercised in that way, and it also provides a mechanism for assessing the lawfulness of the decision. [52] As Judge Everitt did not give reasons to justify name suppression order we cannot be sure why he exercised his authority in the manner he did.

Another interesting aspect of the suppression order in this case is that the order did not prohibit the professions of the persons from being published. Two of those connected with the "white-collar drug-ring" were said to be television sporting celebrities.[53] Given the size of New Zealand and the limited number of television sporting celebrities in New Zealand there is only a limited amount of people to whom the suppression order could refer.[54] This undoubtedly has led suspicion to fall on others, which has previously been identified as a public interest factor in favour of publication.

Another issue arises when one considers the above factors in tandem. As no reasons were given for the suppression order but we are told that two of the persons involved in the 'drug-ring' are sporting celebrities, the inference that there is a "special echelon for privileged people" resonates. The lack of reasons invites the conclusion that the suppression order was based on their status as celebrities, which is undoubtedly inconsistent with the authority on section 140 of the Act. The original suppression order covered all ten persons alleged to be involved with the 'drug-ring', which could suggest that the argument that there is a "special echelon for privileged people" is fallacious. But nearly all of the other people involved were successful members of society, although "[n]one is a household name."[55] As those who are successful members of society are likely to receive more media attention than their less successful peers, then perhaps a

[52] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, para 80 (CA) Elias CJ for the court.
[53] David McLoughlin "Celebrities snared in a tangled web" (July 30 2005) *The Dominion Post* Wellington A14.
[54] Steven Price "Interesting Name Suppressions" (2005) NZMLJ@yahoogroups.com.
[55] David McLoughlin "Celebrities snared in a tangled web" (July 30 2005) *The Dominion Post* Wellington A14.

"special echelon for privileged people" should be created. Although this option appears undesirable as it allows the court to treat people unequally on the basis of their standing in society, it could be justified on the basis that it is recognition that publicity is applied unequally.[56] This point is addressed further when considering the justification of the present presumptions in suppression law.

So, although the suppression orders could have been justified, the above-mentioned factors make the order somewhat questionable. Adding to the questionability of the suppression orders is the unsurprising amount of media attention that was attracted by the allegations. Because the media were allowed to publicise the professions of those involved it was only natural that this would be a highly publicised incident. One might argue that, if the names of those involved in the event accompanied the heightened publicity, the adverse effect on the individuals would be too severe. This argument would be partly in reliance on the effect of publicity on the presumption of innocence. The heightened publicity surrounding the event and the police being lauded for uncovering this "white-collar drug-ring" seem to contradict the notion of innocence. Accompanying that concern is the fact that acquittals tend not to be extensively publicised,[57] meaning that if those publicly named are later absolved of blame or liability this important fact may not be publicly recognised. Also, even if there is publicity accompanying the clearance "some people may think that the person was guilty, but somehow managed to get off on a 'technicality', as there is 'no smoke without fire'."[58] It is in this regard that the suppression order could be said to be justified. However, even though the above-mentioned argument is meritorious, it is not novel and the presumption of innocence in itself is insufficient to justify a suppression order.[59]

There are several courses of action that Judge Everitt could have taken that would have been preferable. In granting a suppression order (which was open to

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[56] Claire Baylis "Justice Done And Justice Seen To Be Done - The Public Administration Of Justice" (2001) 21 VUWLR 177, 204.
[57] Claire Baylis "Justice Done And Justice Seen To Be Done - The Public Administration Of Justice" (2001) 21 VUWLR 177, 203.
[58] Claire Baylis "Justice Done And Justice Seen To Be Done - The Public Administration Of Justice" (2001) 21 VUWLR 177, 203.
[59] *R v Procktor* [1997] 1 NZLR 295, 297 (CA) Thomas J for the Court.

do) Judge Everitt could have given reasons to support his order. This would have silenced the criticism that there is a "special echelon for privileged people". Or perhaps the Judge could have extended his suppression order to prohibit publication of the professions of those involved, although this may have been difficult to justify in principle. In fact, this may have actually heightened the already intense publicity, as the police had sent out an email to 65 media outlets with the headline "White-collar drugs ring busted" capitalised in bold print.[60] The media interest would still be intense regardless, and the inability to publish the professions may have in fact heightened the controversy. Another option open to Judge Everitt was to not allow the suppression order. The media interest would have been no greater than it was when only the professions were known, there could be no inference of a "special echelon" and this would have removed the ability to speculate and have suspicion fall on other people who fit the profile of television sports star.

It may be making a storm in a teacup to highlight this suppression order as controversial, but Judge Everitt left himself open to criticism by not giving reasons in support of his order. This was exacerbated by the intense media coverage, which gave the impression that there is a "special echelon for privileged people" when name suppression is in issue. So, although the order may have been justifiable the fact that no justification was given makes the order questionable and open to criticism. This highlights the need for openness, in terms of openly justifying judicial decision-making, even if the openness only goes as far as providing justification for not being open.

The paper now considers, in light of the criticisms and problems that have been identified with suppression orders, whether the presumption against suppression orders is justifiable.

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[60] David McLoughlin "Celebrities snared in a tangled web" (July 30 2005) *The Dominion Post* Wellington A14.

IV IS THE PRESUMPTION AGAINST SUPPRESSION JUSTIFIABLE?

"What has to be stressed is that the prima facie presumption as to reporting is always in favour of openness."[61] This dictum, from the leading case on the making of suppression orders, establishes a presumption in favour of reporting except where there are exceptional circumstances to displace the presumption. But, what is the justification for this presumption? The weighty presumption in favour of reporting has gained almost unquestioned acceptance, and the fundamental importance of openness has resonated throughout the cases determining suppression issues. The importance of open judicial proceedings is not questioned by this paper, as openness is recognised as an important characteristic of a democracy.[62] Openness is especially important in criminal cases, more so than in civil cases, because crimes are said to be committed against the community. Open judicial proceedings ensure public accountability, by providing a check on the judicial process.[63] This can be contrasted to the Family Court, where the issues are essentially private, and there is additional concern for the interests of the children that are often involved. Even with increasing openness in the Family Court though, the names often tend to be suppressed, tending to suggest that the principle of open justice is not being used to destroy private interests.[64]

Openness is also regarded as important when allowing suppression orders as giving reasons ensures the integrity of the judicial system. So, whilst this paper does not question the importance of open judicial proceedings, it does however question whether it is necessary in the pursuance of some end of justice that there is a presumption in favour of reporting where name suppression is sought. In particular it questions whether publication of names is a necessary corollary of the important principle of openness. The publicity associated with criminal proceedings is recognised as an integral part of criminal procedure,

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[61] *R v Liddell* [1995] 1 NZLR 538, 547 (CA) Cooke P for the Court.
[62] *Re Victim X* [2003] 3 NZLR 220, para 51 (HC) Hammond J.
[63] Claire Baylis "Justice Done And Justice Seen To Be Done - The Public Administration Of Justice" (2001) 21 VUWLR 177, 185.
[64] Rt Hon Dame Sian Elias CJ GNZM, "Address to the Australasian Family Courts Conference in Auckland on 15 October 1999" (2000) 3 BFLJ 107.

and – arguably, strangely - is rarely called into question.[65] One of the justifications for publicity and the publication of names is said to be that justice has to be seen to be done, and that openness in turn ensures that justice is actually done.[66] The next part of the paper questions whether this aphorism is an appropriate justification for the presumption against name suppression.

A The Principle of Openness: Justice Has to be Seen to be Done

Openness of judicial proceedings is said to ensure that justice is done. Grant Slevin has stated that the "paramount purpose" of publicity is to ensure that justice is done. It is the argument of this paper that these ideas serve as apt justifications for openness of judicial proceedings, which New Zealand has except for in very limited circumstances, but are perhaps insufficient as justifications for the presumption against name suppression. Even in the limited situations where the Court is closed to the public, the media have the general right to remain in the Court.[67] The next section explores whether the idea, that justice has to be seen to ensure that it is done can be extended to the naming of offenders, victims or other persons connected with the criminal proceedings.

In order to determine whether this can constitute a valid justification for the presumption in favour of publication, it is important to determine what purpose is served by the publication of names. If publicity, as a result of publishing names, can be said to serve an end of justice then perhaps the presumption in favour of reporting is more easily justified. "The general rule of publicity is after all only the means to an end and must yield to the paramount object of doing justice."[68] The logical inference that follows on from that is that something which serves no end of justice should not be done. Hence, where publication of the name of an offender, victim, witness or any person connected with the proceedings does not serve any end of justice then it should not be done.

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[65] Roderick Munday "Name Suppression: An Adjunct to the Presumption of Innocence and to the Mitigation of Sentence" [1991] Crim LR 680, 755.
[66] Grant Slevin "Name Suppression" [2004] NZLJ 223, 223.
[67] Grant Slevin "Name Suppression" [2004] NZLJ 223, 223.
[68] *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120, 131 (CA) Woodhouse P for the Court.

Publication must serve some public interest function or be in pursuance of some end of justice to be justifiable. Hence the starting point in suppression law, from a presumption in favour of publication, prima facie does not appear to be consistent with the notion that the paramount object is of doing justice, unless of course publication of names is necessary to ensure that justice is done. The paper now considers what purpose is apparently served by the publication of names, and further whether publication of names in necessary to ensure that justice is done.

New Zealand courts have recognised that publicity serves a punitive function.[69] In this regard, the naming of offenders post-conviction could perhaps be justified on the premise that publication of their name is part of their punishment for being convicted of a crime. This would however not provide adequate justification for the publication of names of victims, witnesses or other persons connected with the proceedings, and perhaps not even a majority of offenders, as often conviction is punishment enough. It must also be remembered that publicity is not something that the court orders, but rather it is the media that are the proponents of publicity and the punitive aspect of this is further enforced by the public.[70]

Publicity is also said to have a deterrent effect on people.[71] In publishing a person's name that person, and/ or other potential offenders, may be deterred. This rationale could again only logically apply to persons convicted of offences, as it would not make sense, nor would it be fair to claim to deter victims or acquitted persons. In this regard then, the deterrence value of publishing a name is limited. Further, it is unclear whether the theory of deterrence is actually justifiable, in the sense of whether people are actually deterred, which again suggests that the value of publicity as a deterrent is minimal.

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[69] *Police v O'Connor* [1992] 1 NZLR 87, and also recently *T v Police* (22 April 2005) HC DUN 412/12 Chisholm J.
[70] Grant Slevin "Name Suppression" [2004] NZLJ 223, 224.
[71] Claire Baylis "Justice Done And Justice Seen To Be Done - The Public Administration Of Justice" (2001) 21 VUWLR 177, 187.

Publicly naming a person involved in criminal proceedings may also have the effect of bringing more potential victims forward, so in this sense the accuracy of the proceedings could be increased by the publicity.[72] This would be beneficial, and would constitute a valid public interest factor in favour of reporting. However, this reasoning may only be applicable in limited circumstances, and further it may only provide justification for the naming of an accused person rather than any other person connected with the proceedings.

As alluded to earlier, publicity can also serve the function of ensuring that the judicial process is publicly accountable. But this accountability does not require all persons connected with criminal proceedings to be publicly named. The Court will be open, to the media at the very least, so this ensures some degree of accountability. Also, it is often the case that knowing a person's name will not add anything material to a person's knowledge about a case. In this sense then, publication of a person's name would only serve to feed the public prurience, rather than ensuring that justice is done by justice being seen to be done. Hence, the publication of names is not a necessary corollary of openness. The aphorism that justice has to be seen to be done is generally inappropriate and therefore insufficient as a justification for the presumption against name suppression. Moreover, where it is appropriate, it will generally only be applicable to an accused or convicted person. So, not only is this aphorism insufficient as a justification for the presumption, it seems to suggest that the current approach of treating offenders in the same way as victims or acquitted person is not justified.

R v W,[73] a recent decision of the Nelson High Court, is an excellent illustration of the notion that justice can be open, yet the defendant's name can be suppressed. In this case, the accused stood trial for the murder of his five month old baby who, as he was informed earlier on the day of the alleged murder, was suffering from a condition where her brain had ceased to develop at thirteen weeks gestation. The accused's daughter's condition was described as "the worst

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[72] Claire Baylis "Justice Done And Justice Seen To Be Done - The Public Administration Of Justice" (2001) 21 VUWLR 177, 186.
[73] *R v W* (2 December 2004) HC NEL 042/ 1663, *R v W* (8 November 2004) HC NEL 042/1663.

possible survivable brain dysfunction".[74] Mr W suffocated his daughter later that day. Expectedly there was a considerable amount of interest in this tragic story. Goddard J noted that at all stages of the trial the media were well represented and that trial was prominently and regularly covered in the media.[75] Goddard J also noted that the level of debate that followed Mr W's acquittal was evidence that the public was well informed about the trial. As a justification for the ordering of final name suppression Goddard J remarked that "[i]t can fairly be said that the preponderance of public interest favours the privacy interests of Mr W and his family rather than the public interest in knowing his identity." [76] This dictum does not sit well with the decision in *Re Victim X* where Hammond J stated that "the public is entitled to know and form their own views on what happened",[77] as a justification for denying the continuance of name suppression. However, there is good reason to argue that Goddard J has taken the preferable approach.

Goddard J recognised that the important principle of open justice dictates that publication of information regarding a case should not be restricted, save in exceptional circumstances.[78] She also acknowledged that in some situations knowing "the identity of a person can add a material dimension to information about the crime in question".[79] This is an acceptance that the interest of the public will be served by the addition of the name or names of those involved in the proceedings. This point is further developed in the following section when considering whether there is a difference between the public interest and the fact that the public is interested. What is important to emphasise though, is that in this case Goddard J saw no reason justifying the publication of Mr W's name, and Goddard J granted permanent name suppression. Goddard J concluded that this was not a case where knowing the identity of the accused's name would "add substantively to information about the crime in question."[80] The aphorism that justice must be seen to be done could not justify denying Mr W name suppression as the Court was open, the media were well-represented throughout

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[74] *R v W* (8 November 2004) HC NEL 042/1663 para 2 Goddard J.
[75] *R v W* (2 December 2004) HC NEL 042/1663 para 6 Goddard J.
[76] *R v W* (2 December 2004) HC NEL 042/1663 para 4 Goddard J.
[77] *Re Victim X* [2003] 3 NZLR 220, para 38 (HC) Hammond J.
[78] *R v W* (2 December 2004) HC NEL 042/1663 para 3 Goddard J.
[79] *R v W* (2 December 2004) HC NEL 042/1663 para 3 Goddard J.
[80] *R v W* (2 December 2004) HC NEL 042/1663 para 3 Goddard J.

the trial, and the trial was extensively covered without the publication of Mr W's name. That justice must be seen to be done does not necessitate that names are published, as knowing a person's name often will not add anything to a person's knowledge of the case.

Goddard J did not seem to start from a presumption in favour of reporting, searching for "compelling reasons" to justify the suppression order, but rather looked for and found no reasons to publish Mr W's name. Hence her Honour granted the permanent suppression order. This approach does not accord with the authority on making suppression orders, but it is meritorious. Where there are no reasons to justify the publication of a person's name then it should not be published. The approach taken by Goddard J to the question of whether name suppression should be permanently granted suggests that Hammond J was incorrect to deny name suppression in *Re Victim X*, and further casts doubt on the justifiability of the presumption against name suppression on the basis that justice must be seen to be done. That justice must be seen to be done is not an adequate justification for the publication of names, as had already been evidenced by the case of *R v W*. This paper now considers whether the presumption against name suppression can be justified on any other grounds.

B 'Public Interest' v 'The Public Are Interested'

In *Re Victim X* Hammond J held that "the public is entitled to know and form their own views on what happened",[81] and this was his primary justification for holding that Victim X was not entitled to permanent name suppression. Hammond J has seemingly identified the public interest as equivalent to saying that the public were interested. There is no doubt that the public were interested in the Victim X case, but was there any public interest in knowing the identity of the proposed kidnap victim? At first blush it would appear that knowing the identity of the proposed victim would not add anything material to the case and it would only serve to feed public prurience. The paper now considers some

[81] *Re Victim X* [2003] 3 NZLR 220, para 38 (HC) Hammond J.

important public interest factors in the context of name suppression, and also explores the concept of public interest as opposed to public curiosity.

An important public interest factor that needs to be considered in the context of name suppression is freedom of expression. Freedom of expression is a right guaranteed under the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act), and as such is a right that can only be limited if it can be demonstrably justified.[82] Hence, if the media's right to publish the names of persons involved in criminal proceedings is to be limited, this limitation must be justified. The right to freedom of expression is not an unfettered right to "destroy privacy interests", and as such a possible justification for limiting this right may be found in New Zealand's increasing recognition of privacy rights. The Privacy Act 1993, an Act to promote and protect privacy interests, demonstrates the importance of individual privacy, as does the judicial recognition of the tort of privacy. In establishing whether a tort of privacy exists in New Zealand, the Court of Appeal in *Hosking v Runting* had to consider whether having a tort of privacy would be consistent with the freedom of expression.[83] The Court of Appeal decided that the existence of the tort of privacy was consistent with the right to freedom of expression as guaranteed by the Bill of Rights Act. Hence, the Court found that while there is public interest in the right to freedom of expression, freedom of expression "must accommodate other values which society regards as important."[84] Privacy is such a value, and as such freedom of expression must accommodate this. In this regard then, a limitation on the right to freedom of expression is justified where the limitation is made for the purpose of privacy. Also, the granting of name suppression to a person is not a great encroachment on the right to freedom of expression. The media will still have the right to impart information about the details of the case; the only restriction is that the name of the person cannot be published. This is not an overwhelming restriction as often the name of the person will not add a material dimension to the story. So, generally the right to freedom of expression by itself is an

[82] New Zealand Bill of Rights Act 1990, s 5.
[83] *Hosking v Runting* [2005] 1 NZLR 1 (CA). See Andrew Geddis "Hosking v Runting: A Privacy Tort for New Zealand" (2005) 13 Tort L Rev 5, 8.
[84] *Hosking v Runting* [2005] 1 NZLR 1, 56 (CA) Tipping J.

insufficient public interest factor to support denying an application for name suppression.

When considering whether to grant a suppression order there are several other public interest factors that need to be taken into account. The most important of those is that the offender may have the opportunity to re-offend if their name is suppressed. Others are that identifying the accused may lead to other victims coming forward and on similar lines may lead to the discovery of more evidence. The granting of name suppression can lead to suspicion falling on others, and denies the public the ability to draw their own conclusions about associating with the offender. These are undoubtedly valid factors to be considered as part of the public interest, but none of these factors are directly applicable to the Victim X situation. Further, these public interest factors are generally inapplicable to anyone other than an accused or convicted person. Hence, on the commonly identified public interest factors there is no reason to suggest that publication of Mr X's name was necessary.

However, under the approach dictated by the Court of Appeal it is irrelevant that there is no reason to justify publication, as what matters is the fundamental importance of the principle of openness, that can only be displaced by "compelling reasons". It does not necessarily matter that they are no reasons justifying publication. The questionability of this approach is further addressed when considering whether a different "test" should be developed. At this point what is important is whether the Court should make a distinction between the public interest and the public being interested.

If public interest is used as a justification for denying a suppression order it is important to consider whether the correct notion of public interest is being applied. This paper does not deny that in some cases, particularly those involving serious offences, there is a genuine public interest in knowing the identity of the offender, especially where there may be public safety concerns. It is not however clear why public prurience, in the guise of 'public interest', should take precedence over private interests. The difference between public interest and

public curiosity has been made clear in the tort of privacy context,[85] but, from the cases discussed in this paper, it appears that with regards to name suppression the concepts are ostensibly the same. It appears that in the cases discussed in this paper that the public interest and public curiosity are the same concepts.[86] For example, in *R v Liddell*, the authoritative decision on suppression law, it was apparent that the public interest and the public having an interest were the same concepts. When discussing name suppression applications from acquitted persons, Cooke P stated that "the public may have an interest in acquittals", as a reason suggesting publication may in some cases be necessary.[87]

This paper argues that when considering an application for name suppression the Courts should draw a distinction between public interest and public curiosity. Public curiosity is an insufficient justification to support denying a suppression order, because the fact that the public are interested is not a valid public interest factor and further it is an insufficient reason to justify subverting a person's privacy interests. Absent any genuine public interest factors, this paper argues that an application for name suppression should generally be granted. As most public interest factors will be generally inapplicable to victims it is therefore argued that their applications for name suppression should generally be granted.

The approach of Hammond J in *Re Victim X*, whilst unfair and seemingly unjustifiable on a public interest basis, was the correct approach as dictated by the current legal position. There were no compelling reasons why Mr X's identity should have remained suppressed; hence name suppression could not be justified on the authorities. There should however be no need to show "compelling reasons" in order to depart from the presumption in favour of publication where the presumption cannot be justified on the basis of public interest, especially where the applicant is a victim. Where there are no reasons justifying the publication of a name then an application for a suppression order

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[85] See for example *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 (CA) and *Hosking v Runting* [2005] 1 NZLR 1 (CA).
[86] See for example *Re Victim X* [2003] 3 NZLR 220, 226 (HC) Hammond J, *R v W* (2 December 2004) HC NEL 042/1663 and *R v Liddell* [1995] 1 NZLR 538, 547 (CA) Cooke P.
[87] *R v Liddell* [1995] 1 NZLR 538, 547 Cooke P.

should not be denied. The possibilities for amending the criteria for suppression orders are further developed when the reform of suppression law is considered.

C *Should There Be a "Special Echelon for Privileged People"?*

Following on from the issues that arose in the so-called "white-collar drug-ring" case the question arises as to whether, in the context of name suppression, there should be a "special echelon for privileged people". Arguably, this "special echelon" already exists, in the sense that some decisions appear to be made on the basis of a person's public status. There was concern following the decision to grant the All Black permanent name suppression that the decision was made on the basis of his public status rather than anything else. This concern was exacerbated by the fact that the only time that that Court (the Waitakere Family Violence Court) had granted permanent name suppression previously was for another New Zealand rugby player. These decisions have the appearance of being based on something strictly forbidden by the authorities on name suppression.

At first blush, granting a person name suppression on the basis of their public status seems to directly contradict the principle that all people are equal before the law, but at the same time that contradiction seems justifiable in recognition of the fact that there will be unequal publicity depending on a person's status in society.[88] The courts have recognised that publicity, in the context of a criminal trial, serves a punitive function, so it is likely that the punitive effect will be greater the more publicity a person receives. Even though the punitive aspect of publicity is imposed by the media and the public rather than the Court, the Court to some extent has the ability to curtail this punitive aspect by granting name suppression. The paper now considers whether it is justifiable for the Court to consider a person's standing in society, and the likely publicity that they will receive, as part of the name suppression decision.

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[88] Claire Baylis "Justice Done And Justice Seen To Be Done- The Public Administration Of Justice" (2001) 21 VUWLR 177, 204.

There has been an increasing tendency in New Zealand and in other jurisdictions to recognise privacy interests. This is evidenced in New Zealand by the passage of the Privacy Act 1993, the Broadcasting Act 1989, the Harassment Act 1997 and also the recent decision of the Court of Appeal in the *Hosking* case, which confirmed that there is a tort of privacy in New Zealand.[89] In the United Kingdom, and to a lesser extent in Australia, recent cases of 'breach of confidence' indicate a more privacy-oriented approach.[90] This increasing tendency to value the privacy interests of those with high public status may justify an approach to suppression law that accounts for societal status. Hence, it is now considered whether the new lines of legislation and the recently confirmed tort of privacy can be used to justify differential treatment.

There are two principal elements to the tort of privacy in New Zealand. First, there needs to be the existence of facts in respect of which there is a reasonable expectation of privacy; and secondly the publicity given to those private facts must be highly offensive to an objective reasonable person.[91] Whilst criminal proceedings would not generally be considered to be private facts, an analogy can be drawn between the application of this tort and the application of name suppression law, as the tort recognises the privacy interests of public figures, and the name suppression inquiry is essentially determining whether a person can maintain their privacy. Where the tort of privacy, or in other jurisdictions, breach of confidence, is invoked it is generally in situations involving famous persons, such as Mike Hosking in New Zealand,[92] Michael Douglas and Catherine Zeta-Jones,[93] and Naomi Campbell in the United Kingdom,[94] and the claims generally centre on publicity about their private lives. Whilst the above-mentioned cases were not successful, the fact that their claims resulted in court proceedings and the judicial recognition of this particular branch of law shows that public figures are entitled to a reasonable expectation of privacy, as "[t]he right to privacy is not automatically lost when a person is a

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[89] *Hosking v Runting* [2005] 1 NZLR 1 (CA).
[90] See for example *Douglas v Hello! Ltd (No 1)* [2001] QB 967, *Campbell v Mirror Group Newspapers* [2003] QB 633.
[91] *Hosking v Runting* [2005] 1 NZLR 1, para 117 (CA) Gault and Blanchard JJ.
[92] *Hosking v Runting* [2005] 1 NZLR 1 (CA).
[93] *Douglas v Hello! Ltd (No 1)* [2001] QB 967.
[94] *Campbell v Mirror Group Newspapers* [2003] QB 633.

public figure".[95] This recognition of the privacy interests of those with celebrity status may possibly also extend to the "celebrities" who apply for name suppression.

However, the tort of privacy in New Zealand concedes that the expectation of privacy of a person diminishes as their public status increases.[96] So, the more famous a person is the less privacy they can reasonably expect. If our increasing recognition of privacy interests is used as a justification for differential treatment, then this would imply that celebrities involved in criminal proceedings have a lesser expectation of privacy because of their celebrity status and as such should not expect to be granted name suppression based solely on their celebrity status.

There is a defence to the tort of privacy that provides justification for the publication of private facts, where the information is of legitimate public concern.[97] The word 'concern' was deliberately chosen, rather than the broader word 'curiosity' in acknowledgement of the fact that there is a difference between what is of public interest and what the public are interested in.[98] This conception of public interest accords with how public interest should be interpreted in the context of name suppression. Whilst not helpful to the argument that there should be a "special echelon for privileged people", it implies that absent any genuine public interest reason there should be no publication of a person's name.

While the tort of privacy does not provide justification for the creation of a "special echelon for privileged people" it suggests that there should be public interest reasons supporting the publication of a person's name where they wish to maintain privacy. The paper now goes on to consider possible options for reforming suppression law.

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[95] *Hosking v Runting* [2005] 1 NZLR 1, para 121 (CA) Gault and Blanchard JJ.
[96] *Hosking v Runting* [2005] 1 NZLR 1, para 121 (CA) Gault and Blanchard JJ.
[97] *Hosking v Runting* [2005] 1 NZLR 1, para 129 (CA) Gault and Blanchard JJ.
[98] *Hosking v Runting* [2005] 1 NZLR 1, para 133 (CA) Gault and Blanchard JJ.

V REFORMING SUPPRESSION LAW

There are numerous areas of suppression law that have been highlighted as problematic. This section of the paper seeks to examine some possible options for reform in the area of suppression law in order to determine whether some of the identified problems with the current approach to suppression law can be overcome.

The state of the law as to when suppression orders should be granted is relatively clear and well settled despite the lack of legislative guidance. The principle of openness is fundamental and compelling reasons are needed to depart from the weighty presumption in favour of publication. The adherence to this approach has been less than consistent, as was evident in the comparison of the Victim X case and that of Mr W, which forms part of the criticism of suppression orders in general. The main concerns for the purpose of this paper are that the presumption against name suppression does not appear to be justifiable, and also that the same test and factors are applied in a suppression decision regardless of whom the suppression order is for. The paper now considers how these perceived problems could be addressed.

A *Victims of Offences*

1 *Law Commission recommendations*

The Law Commission has recommended several changes to the operation of suppression laws including that "[w]here a request for name suppression of a victim in criminal proceedings is made, that request should be granted unless it would not be in the interests of justice to do so."[99] The government however considers that the existing laws regarding suppression are appropriate.[100] Further, the response of the government emphasises that the current laws are premised on the fundamental importance of the principle of openness and that exceptions

[99] New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R 85, Wellington, March 2004).
[100] New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R 85, Wellington, March 2004).

already exist where appropriate.[101] It has already been shown that the principle of openness does not adequately justify the current approach to name suppression. As such the response of the government can be criticised, and should be reconsidered.

The Victim X case highlighted the unfairness in having the same considerations used in applications for suppression orders that emanate from the victim of the offence, as would apply if the applicant was an accused or convicted person. The recommendation of the Law Commission would alleviate this unfairness by allowing that where an application is made for name suppression by a victim it would in general be granted. It is unclear what situations would fit under the exception "unless it would not be in the interests of justice to do so", which detracts from the persuasiveness of the recommendation. That there should be a mechanism, such as an exclusion, to enable the judge to disallow an application is necessary as there may be a situation where it is desirable that the victim is not allowed name suppression. But whether the Law Commission's mechanism is the correct one is debatable. Their exclusion does fit in with the notion that "[t]he general rule of publicity is after all only the means to an end and must yield to the paramount object of doing justice."[102] So, where publication would serve some end of justice, the Court would have a mechanism by which it could deny the application for a suppression order.

Although undoubtedly there are many situations where it would not be in the interests of justice to grant a victim name suppression, the Law Commission exception still has the appearance of being ambiguous. Although "interests of justice" need not be defined, it would have been beneficial if the Law Commission had given some direction on when this exception should apply. The Law Commission's particular wording seems to have been chosen to maintain consistency with section 138 of the Act, which provides that a Judge may make a suppression order, relating to evidence adduced or names of persons, if it would

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[101] New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R 85, Wellington, March 2004).
[102] *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120, 131 (CA) Woodhouse P for the Court.

be in the interests of justice.[103] The situations that are intended to be covered by section 138 of the Act are where an order may be necessary for the protection of the witness or where there is concern that the crime may be copied (for example in fraud proceedings).[104] The interests of justice could mean justice in the general wider sense, and also could in fact be referring to justice as between the parties.[105] In this regard, the "interests of justice" exception makes sense. Also the Law Commission recommendation remedies the situation, as in *Re Victim X*, where there are no public interest factors supporting the publication of the victim's name. Under the Law Commission recommendation there would be no publication in a situation such as that.

The Law Commission recommendation is meritorious in that it seeks to provide greater protection and respect to victims of offences. The recommendation recognises the unfairness inherent in having the same considerations apply to an application for a suppression order, regardless of whether the applicant is a victim or an offender. The recommendation also recognises that there is no justification for treating victims in the same manner as offenders are treated,[106] particularly after the promulgation of the Victims' Rights Act 2002, an Act "to improve provisions for the treatment and rights of victims of offences".[107] The Victim X case highlighted the unfairness in having the same considerations applying, and this paper considers that the Law Commission recommendation could be an appropriate mechanism for remedying this unfairness. However, it is argued that the Law Commission recommendation is unnecessary, as alternatively this paper proposes the insertion of a new section 140A into the Act. Section 140A is seen as preferable to the Law Commission recommendation as it also remedies other unfairness that is inherent in the current approach to suppression law. The paper now considers other aspects of

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[103] Criminal Justice Act 1985, s 138(2)(a)(i)-(ii).
[104] Claire Baylis "Justice Done And Justice Seen To Be Done - The Public Administration Of Justice" (2001) 21 VUWLR 177, 197.
[105] Claire Baylis "Justice Done And Justice Seen To Be Done - The Public Administration Of Justice" (2001) 21 VUWLR 177, 197 when discussing "the interests of justice" in section 138 of the Act.
[106] New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R 85, Wellington, March 2004).
[107] Victims' Rights Act 2002, s 3.

the current approach that promote unfairness, and then subsequently proposes an alternative to the current approach to suppression law.

B Offenders

This paper has considered the fundamental principle of openness and explored possible justifications for the presumption in favour of publication. Publication of an offender's name has been shown to be unnecessary to preserve the fundamental importance of openness, as the Court will still be open to the media and usually to the public, and in general knowing the offender's name does not add anything to the report. It is in this regard that the paper proposes that the approach to name suppression applications is in need of reconsideration, as the presumptions that the current approach are premised upon do not seem to be entirely justifiable.

It is submitted that in general names of those involved in criminal proceedings should be publishable, but where an application is made for name suppression a presumption in favour of publication is inappropriate. "[P]ublicity is after all only the means to an end and must yield to the paramount object of doing justice."[108] What is important is that the interests of justice are served. The interests of justice do not appear to be served by having an inflexible requirement that "compelling reasons" must be evidenced in order to justify name suppression. Unless there are public interest reasons justifying the denial of a name suppression application, then applications should generally be accepted without the need for "compelling reasons".

The inherent unfairness in treating victims in the same manner has already been highlighted. It is further submitted that there is unfairness in treating convicted, accused and acquitted persons in the same way. Fundamentally different considerations apply depending on what stage of the criminal proceedings a defendant is at. The presumption of innocence or a person's acquittal are factors that deserve to be accorded more weight when a

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[108] *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120, 131 (CA) Woodhouse P for the Court.

decision is made concerning name suppression than the current approach dictates. The next section seeks to provide justification for treating these classes of persons differently.

1 Accused Persons

"While the rhetoric of the court system is that an accused is presumed innocent until proven guilty, the punishment of publicity can be meted out before a verdict is reached, often with long lasting effects."[109] Under the current approach to suppression law the presumption of innocence is only a factor to be considered and in itself does not justify the granting of name suppression. Hence, in essence the same considerations apply to an accused person as they do to a convicted person. The presumption of innocence is a fundamental right guaranteed by the Bill of Rights Act,[110] and the publication of a person's name at the pre-trial stage is arguably a serious encroachment on this right. It was recognised earlier that publicity serves a punitive function. Although an accused person is presumed by the Court to be innocent until proven guilty, the public does not always afford an accused the benefit of this presumption. Because people generally think that "there is no smoke without fire",[111] publication of an accusation serves the same punitive function as the publication of a conviction. In that regard it is not in accordance with the principles of justice that there needs to be "compelling reasons" before an accused can obtain the full benefit of their right to be presumed innocent. Rather there should be a requirement of "compelling reasons", such as genuine public interest reasons, in order to disallow an accused person's application for name suppression because of the importance of the presumption of innocence.

2 Acquitted Persons

The Court of Appeal in *Liddell* also held that the same considerations apply to an acquitted person applying for name suppression as a convicted person,

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[109] Claire Baylis "Justice Done And Justice Seen To Be Done - The Public Administration Of Justice" (2001) 21 VUWLR 177, 203 footnote omitted.
[110] New Zealand Bill of Rights Act 1990, s 25(c).
[111] Claire Baylis "Justice Done And Justice Seen To Be Done - The Public Administration Of Justice" (2001) 21 VUWLR 177, 203.

that "compelling reasons" are needed to displace the weighty presumption in favour of openness, and that the "public may have an interest in acquittals".[112] Although name suppression will be more readily granted to a person who is acquitted,[113] and interim name suppression may be granted to an accused person, it seems unjust that acquitted and accused persons are treated in the same way as a convicted person. "Acquittals are often not as widely [publicised], and some people may think that the person was guilty, but somehow managed to get off on a 'technicality'".[114] An accused person may receive a considerable amount of publicity for their alleged criminal involvement, but it does not necessarily follow that their subsequent acquittal will be prominently publicised. Even if their acquittal is publicised the punitive aspect of punishment can still operate, as it is often believed that "there is no smoke without fire".[115] Thus, where an acquitted person applies for name suppression it is argued that it should generally be granted unless there are public interest reasons justifying the publication, because of the punitive effect that publication can have.

C The Need for Public Interest

The above section highlighted the unfairness in the current approach to suppression law, that persons are treated in the same manner regardless of whether they are a victim or offender, and regardless of what stage they are at in the criminal process.

However, it is argued by this paper that in order to alleviate this unfairness all that is required is an approach that is based upon public interest. Beyond failing to make a distinction between the classes of persons, the current approach is concerning, what is more concerning about the current approach is that public interest is not a focal point. The concomitant publicity that accompanies publication of a person's name is often punitive, and it encroaches on the privacy interests of the person named. The main concern in publishing a

[112] *R v Liddell* [1995] 1 NZLR 538, 547 (CA) Cooke P for the Court.
[113] *R v Liddell* [1995] 1 NZLR 538, 547 (CA) Cooke P for the Court.
[114] Claire Baylis "Justice Done And Justice Seen To Be Done - The Public Administration Of Justice" (2001) 21 VUWLR 177, 203.
[115] Claire Baylis "Justice Done And Justice Seen To Be Done - The Public Administration Of Justice" (2001) 21 VUWLR 177, 203.

person's name is that these interests are violated without justification. The problem that has been commonly identified throughout this paper is that publication can occur whether it is a victim, an accused, an acquitted or a convicted person where there is no justification for publication. Despite the concerns that this paper has identified with the current operation of suppression law, it has always accepted that public interest provides an adequate basis for the making of a suppression order, even where it encroaches on an innocent person's private interests. Hence it is accepted that as long as publication of a person's name can be justified on the grounds of public interest then these concerns, regarding justifiability and the failure to distinguish between classes of persons, have been adequately allayed. In this regard then the paper proposes that decisions that are made concerning name suppression should be based primarily on public interest.

D Reform

If the above arguments are accepted, that there should be a requirement of public interest in order to justify declining an application for name suppression, then where should the change emanate from: Court or Parliament?

As section 140 of the Act is generally permissive, it would be within the jurisdiction of the Court of Appeal or Supreme Court to dictate that a new approach to suppression orders is required, and that absent any public interest factors it should be unnecessary to require that "compelling reasons" are given in order to justify a suppression order. However, it would be preferable and more certain if the change were to come from Parliament. Although the recommendations by the Law Commission are meritorious they are seen as superfluous, as it is argued by this paper that the injustices that the Law Commission seeks to remedy can be resolved via the reform proposed below.

For practical reasons it is necessary and preferable that applications for suppression orders are required rather than name suppression being automatic. This is because if name suppression was automatic there may be circumstances where it would be in the public interest to know a person's identity and a blanket

rule making name suppression automatic may prevent the public from knowing this person's identity.[116] Although previously, when name suppression was automatic for accused persons in New Zealand,[117] the Judge could make an order that allowed publication, it is unclear whether this alone satisfactorily allays the concern as there is still the possibility that the public interest can be jeopardised. The criteria for allowing name suppression should be different from the current presumption in favour of publication. This paper proposes that the law regarding suppression orders should be amended and a new section 140A should be inserted into the Act as follows:

> Section 140A - Where an application is made under section 140 of this Act the application should be allowed unless it would not be in the public interest to do so. In considering an application under section 140 the Court must take into consideration whether the applicant is a victim, an accused or otherwise, and give weight to this accordingly.

Public interest, under section 140A, would not be wide enough to include public prurience, but rather would include factors analogous to those already considered, such as those discussed in *R v Liddell*.[118] Although 'public interest' as a concept would not be defined by the legislation, it is recommended that there is some direction as to what constitutes public interest, but without providing an exhaustive list. This would ensure that the section is not interpreted in a way that incorporates public curiosity or prurience as these are not valid public interest factors. No justification has been found for the current approach to suppression law that requires "compelling reasons" to depart from the presumption in favour of reporting. Section 140A requires that where an application for name suppression is not granted, that such a decision must be justified in the public interest and this ensures that the publication serves some end of justice. In order to show that it is not in the public interest to grant name suppression the party

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[116] Claire Baylis "Justice Done And Justice Seen To Be Done - The Public Administration Of Justice" (2001) 21 VUWLR 177, 205.

[117] From 1975-1976 the Criminal Justice Act 1954 was reformed so that publication of an accused person's name was prohibited by sections 45B-D until they were convicted, and if they were acquitted then the suppression became permanent. See Claire Baylis "Justice Done And Justice Seen To Be Done- The Public Administration Of Justice" (2001) 21 VUWLR 177, 202.

[118] *R v Liddell* [1995] 1 NZLR 538, 544-546 (CA) Cooke P for the Court.

opposing name suppression would have an evidential burden to point to some credible narrative suggesting that it is not in the public interest to grant name suppression. Where is no evidence or insufficient evidence to suggest that publication of the applicant's name would be in the public interest then the application for name suppression would be granted. Any decision made under sections 140 and 140A should be appealable by either party and shall also be reviewable at any later stage by the Court. This would ensure that the Court has the ability to take into account changes in circumstances.

Although in general any concerns about name suppression should be alleviated by having a public interest requirement before an application is denied, concerns can be further allayed by making it mandatory for the Court to consider the role that the applicant plays in the criminal process. By mandating this approach it is envisaged that more weight will be given to the fact that the applicant is for example a victim, and accordingly greater public interest will be required to deny their application for name suppression. This approach also reinforces that different considerations apply depending on what role the applicant plays in the process, and also depending on what stage of the proceedings it is.

To ensure accountability and openness it is recommended that all decisions on name suppression applications are accompanied by reasons supporting the decision. This ensures that decisions cannot be criticised in the same way that the decision of Judge Everitt was in the "white-collar drug-ring" case.

The section 140A reform would ensure that where name suppression applications are denied and a person's name is publishable, the decision is based on defensible principles and presumptions. The public interest would be served, the fundamental importance of the principle of openness is still upheld and justice would be done.

VI CONCLUSION

Despite the lack of clear legislative guidance, the approach to suppression law in New Zealand is surprisingly clear, although not consistent. There is a strong presumption in favour of publication, and this is only departed from where there are "compelling reasons" to justify doing so. This approach is apparently justified by the fundamental principle of openness and that justice has to be seen to be done.

The cases of the All Black, Victim X and the "white-collar drug-ring" were discussed as they each raise interesting issues in the context of name suppression. It was argued that the All Black case was wrongly decided, but for the right reasons and conversely the Victim X case was rightly decided, but for the wrong reasons. These cases highlighted some of the problematic elements of the current approach to suppression law.

The validity of the principle of openness as a justification for the presumption against name suppression was explored in order to determine whether the current approach to suppression law is justifiable. Open justice and the principle of openness were found to be insufficient as justifications for this approach to suppression law as name suppression does not encroach on the openness of justice. The courts are still open to the public and the media, and details of the case are still publishable. Further, it was argued that in most cases knowing the identity of the person would not add anything to a story about the case, apart from fuelling public prurience. Disallowing an application for name suppression because there are no "compelling reasons" to do so does not serve any end of justice. The only valid basis for publication of a person's name despite an application for name suppression is public interest, as serving the public interest is serving an end of justice. It is important to note however that public interest is not the same thing as public prurience or curiosity.

The unfairness inherent in the current approach to suppression law was also found to be unjustifiable. There are no reasons that necessitate treating

victims, offenders, witnesses, accused persons or acquitted persons in the same manner when it comes to making a decision about granting or denying name suppression. The paper also considered whether it could be justifiable to create a "special echelon for privileged people" in terms of making a suppression order on the basis of a person's societal status. Despite the increasing recognition of the privacy interests of public persons, such an approach to suppression law was not found to be justifiable. This examination did however, highlight that publication of a person's name despite their claim to privacy should only occur where it is in the public interest.

As the current approach to suppression law was highlighted as unjustifiable, and at times unfair, the paper considered possible options for reform. The Law Commission's recommendation was discussed, and was found to provide an appropriate mechanism for remedying the unfairness of the current approach to suppression law with regard to victims of offences. However, their recommendation was seen to be superfluous, as the insertion of a new section 140A would remedy the unfairness to victims, as well as the unfairness to all other applicants.

The section 140A focus on public interest remedies the inadequacies of the current approach to suppression law, and it would ensure that decisions on name suppression applications were justified in the public interest. Section 140A also mandates that the Court takes into consideration the role that the applicant plays in the proceedings, in order to ensure that appropriate weight is given to factors such as the presumption of innocence. It was argued that the insertion of section 140A is preferable to the current approach to suppression law as it ensures that decisions regarding name suppression are justifiable. Open justice can still be of fundamental importance under section 140A, but most importantly it would ensure that the public interest is served.

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VIII APPENDIX

Criminal Justice Act 1985
Section 140.Court may prohibit publication of names—

(1)Except as otherwise expressly provided in any enactment, a court may make an order prohibiting the publication, in any report or account relating to any proceedings in respect of an offence, of the name, address, or occupation of the person accused or convicted of the offence, or of any other person connected with the proceedings, or any particulars likely to lead to any such person's identification.

(2)Any such order may be made to have effect only for a limited period, whether fixed in the order or to terminate in accordance with the order; or if it is not so made, it shall have effect permanently.

(3)If any such order is expressed to have effect until the determination of an intended appeal, and no notice of appeal or of application for leave to appeal is filed or given within the time limited or allowed by or under the relevant enactment, the order shall cease to have effect on the expiry of that time; but if such a notice is given within that time, the order shall cease to have effect on the determination of the appeal or on the occurrence or non-occurrence of any event as a result of which the proceedings or prospective proceedings are brought to an end.

(4)The making under this section of an order having effect only for a limited period shall not prevent any court from making under this section any further order having effect either for a limited period or permanently.

[(4A)When determining whether to make any such order or further order in respect of a person accused or convicted of an offence and having effect permanently, a court must take into account any views of a victim of the offence, or of a parent or legal guardian of a victim of the offence, conveyed in accordance with section 28 of the Victims' Rights Act 2002.]

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