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Dear Rachel

### **Suppressing Names and Evidence**

The Society's Criminal Law Committee is grateful for the opportunity to comment on the Law Commission's *Suppressing Names and Evidence* issues paper. Its response to the questions in the paper are set out below.

#### Chapter 2 – Suppression of evidence

1. *Is open justice the appropriate starting point when considering publication of evidence? If so, on what grounds should it be able to be rebutted?*

The committee believes that the underlying principle that justice should not only be done, but be seen to be done, remains appropriate. The principle of open justice should therefore be the starting point, but exactly what is meant by open justice needs to be defined. A narrow interpretation could look only at the result of the process. At the other end of the scale is a view that the process should be totally transparent.

The committee favours a view that, within reason, the process should be transparent. However, there are and should be limits to what can appropriately be reported publicly.

The responses to the questions which follow deal with the grounds on which the committee believes that open justice should be limited. Of particular importance, "open justice" should be limited when the very openness itself threatens to undermine the principle of achieving justice.

2. *Do you agree that the following grounds are no longer appropriate:*

(a) *Public morality;*

The ability for a court to restrict publication on the grounds of public morality is to some degree archaic and paternalistic. Nonetheless there may be circumstances where such a ground might be appropriate.

(b) *The protection of the reputation of victims of sexual offences and extortion?*

The court should still be permitted to suppress publication under these circumstances.

3. *Should the security or defence of New Zealand continue to be a ground for suppression of evidence?*

Yes.

4. *Is protection of the right to a fair trial an appropriate ground? If so, what level of risk needs to be shown to rebut the presumption of open justice?*

Where publication threatens the right to a fair trial it threatens justice. The purpose of our justice system is to achieve justice, not to secure free and open comment. Protection of the right to a fair trial is therefore a fundamental ground for restricted publication.

The level of risk to a fair trial is not something that can be quantified. There must be some evidential threshold. The committee would support a test which includes the concept of reasonableness, such as “reasonable grounds” to suspect that publication may prejudice the right of a party to a fair trial.

5. *Are the following new grounds appropriate:*

(a) *undue hardship to victims;*

Yes.

(b) *the maintenance of the law;*

Yes.

(c) *the safety of any person?*

Yes.

6. *Is there a need for a residual ground for suppression of evidence? If so, is the “interests of justice” the appropriate test, or is there a more specific test which should be adopted?*

Yes. As mentioned above the purpose of the system is to achieve justice and so the interests of justice must be the touchstone for any consideration within the process.

While other tests might be considered, the committee believes that a general “interests of justice” test is the most appropriate formulation because it is unfettered and allows the proper exercise of judicial discretion.

7. *Should the formulation of “undue hardship to the victim” be adopted in preference to the ground set out in section 375A(4) of the Crimes Act 1961 (which provides for the court to prohibit publication of details of the criminal acts alleged in sexual cases, if the court is of the opinion the interests of the complainant so require)?*

The committee accepts that the existing test of “interests of the complainant” is vague and creates a threshold that is too low. The committee agrees that the “undue hardship to

the victim” test is more appropriate and should be extended to victims of all offences where the definition of “victim” is consistent with s 4 of the Victims’ Rights Act 2002.

8. *Should the courts have the power to make blanket suppression orders?*

The committee shares the concern expressed by the Court of Appeal at the extreme scope of the order made by the High Court in *Broadcasting Corporation v Attorney General*. It is difficult to imagine circumstances in which a complete blackout of publicity would be justified. Nonetheless, there may be extreme circumstances involving, for example, national or international security, or where prejudice might arise to the interests of an accused person facing a series of trials from publication of details of the first in time, which may justify such an order.

If the court is to have a residual power to make a blanket order there should be a strict limitation placed on such power and it should be limited to extreme and extraordinary circumstances.

9. *If not, is there a need for a statutory prohibition on orders of this nature?*

No. A Court’s discretion should not be fettered by prohibiting it from making such an order.

*Chapter 3 – Suppression of name or identifying particulars of accused or convicted persons*

The committee believes that, generally, the media has taken the concept of “open justice” too far in recent years. There is significant concern about the process and manner of the media’s reporting of crime, justice and punishment. Parties, often the police but also the defence, are increasingly attempting to influence public opinion before trial and, often, even before charges are laid or investigations are completed.

Further, we cannot rely on the media to report in a balanced way, nor it seems can we rely on academics, lawyers and other commentators to avoid expressing opinions on the merits of a case until all investigations and court processes have been completed. The concept of *sub judice* appears to be lost, and the committee is of the view that the concept of public interest in reporting has been corrupted. For example, Temm J in *R v S, HC Auckland, 13 October 1992, T233/92*) said the following:

“... I want to deal with one final important matter. It is the question of the public interest in the case. Public interest is not indicated by this kind of barrage over here [*indicating the media in Court*]; that is not public interest, that is public curiosity. Public interest properly interpreted means the public welfare, the common good, the good of society. The phrase ‘public interest’ is often twisted by people when they really mean public curiosity and often a desire to gloat. That is not public interest...”

Prohibition of publication, particularly of name, is not necessarily inconsistent with open justice. In most cases the Court process remains open, anyone can observe the proceedings, and the media is still able to report on the substance of the proceedings. These factors answer many of the apparent concerns and explain the rationale relating to the importance of open justice in our Court system.

10. *Do you agree that the presumption of open justice should apply to suppression of the names of accused and convicted persons?*

Yes. However, an important distinction needs to be drawn between those accused of a crime, and those convicted. Name suppression should be available more readily to those accused and less readily to those convicted. Consideration should be given to altering the onus in name suppression issues, depending on what stage the proceedings have reached.

As mentioned earlier, prohibition of publication, particularly of name, is not necessarily inconsistent with open justice.

11. *Do you agree that:*

- (a) *protection of the right to a fair trial;*  
 (b) *undue hardship to victims; and*  
 (c) *the interests of justice;*

*are appropriate grounds for suppression of the names of accused and convicted persons? Why/why not? Are there any other grounds that should be considered?*

The committee agrees that the three identified factors are relevant and appropriate grounds for the suppression of names and identifying details. However, the committee would prefer a test of hardship to the accused or others (whatever standard of hardship is identified) to be a specific ground identified in the statute, rather than simply a factor to be considered under the “interests of justice” ground.

12. *Should there be a statutory list of factors to assist in determining what the interests of justice require?*

Yes. However, a list of factors in determining the “interests of justice” should not be an exclusive list. If a list is provided, there should be a catch all for any other factor(s) the Court considers relevant in the circumstances of the case or of the accused.

13. (a) *Should hardship to the accused be a factor to be taken into account in name suppression applications?*

Yes.

- (b) *If so, what level of hardship should be required?*

Undue hardship is an appropriate standard. Extreme hardship sets the bar too high. Tests such as “irreparable harm to the accused’s reputation” (refer paragraph 3.29 of the issues paper) set the standard too high. The test should be “significant harm”, or “harm out of proportion to the gravity of the alleged offence”.

- (c) *Is a different threshold appropriate for people such as family members of the accused?*

If a higher standard than that advocated above is set for the accused, then a different threshold is appropriate for other persons (family members, employers, etc). The test for such third parties should be undue hardship.

14. (a) *Should the fact that name suppression may have a greater impact on well known people affect suppression decisions? If so, why?*

The committee agrees with the comments contained at paragraph 3.37 of the issues paper. The simple fact is that publicity is not applied equally to all people who appear before the Court. In the committee's experience, the media can effectively create a frenzy of interest or publicity and then seek to rely upon "public interest" as a factor in opposing non-publication orders. The reality is that publicity will often have a greater deleterious impact on those with a high public profile than those without. Accordingly, the actual or potential impact on the particular accused must always be a relevant factor. So long as the focus is on actual or potential impact on the *particular* accused, this will not create a "class" of persons for whom name suppression is automatically granted.

(b) *Should it be listed as a separate statutory factor, and if so in what way?*

Yes. A test such as the "actual or potential impact upon the particular accused or upon his or her reputation in all the circumstances of the particular case, having regard to the gravity of the alleged offence" may be considered appropriate.

15. *Should privacy be a factor to be taken into account in applications for name suppression? If so, what does privacy mean in this context?*

The committee agrees with the comments at paragraph 3.40 of the issues paper, in the sense that there are no "privacy" interests in a public wrong. However, a more appropriate label might be to have regard to a person's right to be treated with dignity, and not to be subject to humiliation or degrading treatment, even if charged with serious offending. The concepts of "privacy" referred to in a number of cases are, in the committee's opinion, intended to reflect those values.

16. (a) *Should the seriousness of the offending be a factor to be taken into account in applications for interim name suppression?*

Yes.

(b) *If so, how should it operate before and after trial?*

It is difficult to pre-determine or to set rules as to how the seriousness of the charge will be relevant to any application for name suppression in any particular case. For the reasons set out at paragraph 3.43 of the issues paper, the seriousness (or lack of seriousness) of the charge might operate in different ways at different stages of the proceedings. For this reason, it seems sensible to leave a large degree of discretion to the Court as to the impact of the seriousness of the charge on the particular application for suppression.

17. (a) *For what purposes should the views of the victim be taken into account as a factor in name suppression applications?*

Except to the extent that publication of the name of the accused will have an actual impact upon the alleged victim, the committee believes that the views of the victim as to suppression orders are irrelevant.

*(b) If so, how should it operate before and after trial?*

As above. If the views of the victim are to be considered (outside the ambit of consideration of actual impact upon the victim), they should carry minimal weight.

18. *(a) Should futility be a reason for declining suppression orders?*

No. Continued publication may be just as damaging (or more damaging) than earlier publicity.

*(b) Are there circumstances where suppression orders should be made despite an earlier publication? If so, what are they?*

Yes. An application for non-publication should be able to be made at any stage of a proceeding if there are appropriate grounds for such an application at the relevant time. Indeed, there may be a greater need for non-publication orders as a matter gets closer to trial, even if there has been publication previously. The Court should be able to have regard to all relevant factors, which are to be considered as at the time of the application.

19. *If there is a statutory list of factors to be considered in name suppression cases, should it be exclusive, or non-exhaustive?*

Non-exhaustive (see response to Question 12 above).

20. *Are there other factors which should be included in a list of statutory criteria?*

No. However, a non-exhaustive list of statutory criteria will enable the Court to give effect to any additional factors applicable in a particular case.

21. *(a) Should there be greater protection given at the pre-trial stage to protect the reputations of people who have been charged with offences?*

There should be greater protection at the pre-trial stage. Arguments or legal niceties as to whether publishing the fact of a charge offends against the presumption of innocence ignores the reality that for the vast majority of the population, there is a perception that there is no smoke without fire – someone charged is probably guilty. The Commission appears implicitly to endorse such a view when it states at para 3.13 “given that there is a high factual probability that those charged with offences are guilty of them ...”

*(b) If so, should open justice remain the starting point, with impact on reputation being a factor to be taken into account in pre-trial suppression decisions? Is the hardship factor adequate to deal with this, or should there be a specific factor relating to the risk of irreparable damage to reputation?*

A different onus should apply pre-trial and after conviction. Pre-trial, if an evidential foundation is laid for an application for non-publication, the onus should be on the Police and/or Crown to establish that non-publication is not necessary. Post conviction, the ordinary rule should be in favour of publication, and the onus should be on those convicted to establish the need for non-publication orders. Given the Commission’s

comments at paragraphs 3.55 to 3.59, it is acknowledged that this view is unlikely to be accepted.

*(c) Alternatively, should the names of the persons charged be suppressed pre-trial with power to publish if required in the public interest?*

Yes, for the reasons set out above.

*(d) Is there any merit in the South Australian requirement of equal publicity to acquittal?*

Yes, if the proposals referred to above are not adopted.

Chapter 4 – Suppression of names or identifying particulars of victims, witnesses and others

22. *Is the current automatic suppression provision in section 139 of the Criminal Justice Act 1985 justified?*

Yes.

23. *Should section 139 be amended to make it clear that a victim can apply for disclosure of their name at any time, including after a trial is completed?*

Yes.

24. *Should the automatic name suppression provisions be extended to further categories of crime victim, such as victims of domestic violence, or victims under the age of 17? If so, what categories and why?*

No, the provisions should not be extended to specific categories of crime, but in circumstances involving domestic violence, perhaps the presumption could be that the victim's name is suppressed, unless he or she does not wish to have their name suppressed. In such cases, there are often children who should be protected and that will be of greater concern to the victim than the ramifications of publication of their own name.

25. *Alternatively, should there be automatic name suppression for all crime victims subject to the power of the court to order publication?*

No, there should not be automatic suppression for all victims.

26. *Is open justice the appropriate starting point for publication of victims' names in some or all cases?*

Yes, in some cases. Suppression issues often depend on the particular charge faced by the defendant, the circumstances alleged in relation to the offending, and the views of the victim. It should not be presumed that suppression would be appropriate.

27. *Do you agree the presumption of open justice should be rebutted if publication of the name of the victim:*

- (a) *would endanger the safety of any person;*
- (b) *would result in undue hardship to the victim;*
- (c) *for any other reason would not be in the interests of justice?*

Yes, but the presumption of open justice must remain paramount, so the rules relating to publication of the name of the victim must be clear and unequivocal. Statutory rules would be preferable to common law rules being developed, perhaps in an *ad hoc* way. The circumstances in which the presumption of open justice might properly be rebutted must be wide ranging.

28. *Is the current automatic suppression provision in section 139A of the Criminal Justice Act 1985 justified?*

Yes.

29. *Should child witnesses be entitled to apply for disclosure of their name when they reach the age of 17?*

All 17 year olds are not equal in maturity and intelligence, and would not have an equal grasp of the ramifications of publication. Any such decisions would have to be well informed and supported, especially in circumstances of sexual offending.

30. *Do you agree that open justice is the appropriate starting point in the case of witnesses' names? If so, what grounds should rebut the presumption?*

No. There are other considerations, some of which might override the presumption of open justice, depending on the particular circumstances of the case in question.

31. *Do you agree that appropriate grounds include:*

- (a) *that publication would endanger the safety of any person;*
- (b) *that publication would involve undue hardship to the victim or witness;*
- (c) *that for any other reason publication would not be in the interests of justice?*

If open justice were the starting point, then appropriate grounds for rebutting the presumption would include (a), (b) and (c) above.

32. *Are the protections contained in the following provisions in relation to suppression of the names of witnesses appropriate:*

- (a) *anonymity orders under the Evidence Act 2006;*

Yes, in appropriate circumstances.

*(b) sections 108 and 109 of the Evidence Act 2006, relating to undercover police officers;*

Yes.

*(c) section 13A of the New Zealand Security Intelligence Service Act 1969?*

Yes.

33. *Given the finding of the Court in “Shapiro”, should there be a legislative provision enabling the court to prevent publication of the identity of persons connected with the accused where the accused’s own identity is not the subject of a suppression order?*

Yes, the only proper way to deal with such a situation would be by way of a legislative provision.

#### Chapter 5 – Closing the court

34. *When should the court have power to close the court to protect information?*

The power must be part of the Court’s inherent power to regulate its own proceedings. Legislation would be necessary, if such powers were to be available. It would only be in the most compelling circumstances that the Court should have the power to close the Court to protect “information”, although the powers to close Courts to protect witnesses, complainants, or other participants might have to be more clearly and flexibly defined.

The committee would probably not support such a power, unless the circumstances were very compelling.

35. *Should the grounds for closing the court:*

*(a) include the same grounds as those available for orders for suppression of evidence, submissions and names of witnesses;*

Yes.

*(b) expressly provide for the court to be closed where there is disorder in court such that it is not possible to conduct the trial in public?*

Yes.

36. *(a) Is the approach of the Family Court to “accredited media” appropriate in criminal proceedings?*

No. The committee does not support the “accredited media” approach of the Family Court in criminal proceedings.

*(b) If not, is there some other means of distinguishing legitimate freelance journalists from members of the general public?*

No comment.

37. (a) *Is the power to exclude the media where matters of security and defence arise appropriate?*

Yes.

- (b) *Should there be a similar power to exclude the media to protect other interests? If so, which interests?*

Yes. Interests of victims, witnesses and other participants in the process should be protected.

- (c) *Should there be power in criminal cases for courts to deal with certain issues in chambers? If so, when is this appropriate?*

Yes, where all parties agree, where the Judge considers that the subject matter warrants such a course, and where the defendant is present.

- (d) *Are the provisions relating to bail hearings contained in the Bail Act 2000 appropriate? Should there be an automatic prohibition on publication of the content of bail hearings?*

Yes.

38. (a) *Is the power to exclude the public under section 375A of the Crimes Act 1961/185C of the Summary Proceedings Act 1957 appropriate?*

Yes.

- (b) *Are there any categories of witness other than complainants in sexual cases who should be protected in this manner?*

No.

#### Chapter 6 – Inherent jurisdiction, interim orders and reasons

39. *Should the courts retain a residual inherent jurisdiction in relation to the suppression powers provided in the Criminal Justice Act 1985?*

The committee believes that retention of the residual inherent jurisdiction in the High Court is acceptable, as it affects so few cases.

The committee view the retention or otherwise of the “inherent jurisdiction” as of only minor impact and irrelevant to the overall debate on name suppression. If it is retained, it will only be capable of use in High Court trials (of which there are fewer and fewer each year) as more and more trials occur in the District Court, and all the early stage suppression orders occur at that level.

In situations where there is no prescribed course of action, the retention of the residual discretion could be beneficial to the overall administration of justice, as occurred in the *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA) case.

40. *Should there be a statutory provision prohibiting publication of identifying details of a person arrested for or charged with an offence before they appear in Court?*

Yes, there should be a statutory provision to this effect. It is contrary to justice for a newspaper or media outlet to circumvent an application for name suppression by being quick to publish a person's identity before he or she has a chance to make the application.

41. *If so, is there merit in considering a similar prohibition in relation to section 138? How might such a prohibition be framed?*

No. It is unclear how s 138 of the Criminal Justice Act 1985 fits into this logic, as the section deals with the Court's power to clear a Court and forbid a report of proceedings.

This means there is no opportunity to circumvent the "name suppression order" prior to someone appearing in Court because the person will already be before the Court when any order is issued.

42. *Should there be a statutory provision for short-term interim orders to be made where there is an application for name suppression, without the need for the court to inquire into the merits of the application? What would the grounds be for such a provision?*

No. All applications for interim name suppression should be made on the basis that there is an arguable case for full name suppression.

43. *Should specifying the date for the termination of an interim order be a mandatory requirement?*

No. An application for full or final name suppression may be delayed for any number of reasons. An interim order should exist until it is specifically discharged by a competent judicial officer, and not by mere effluxion of time.

44. *Should there be a statutory requirement that reasons must be given for the grant or dismissal of a suppression order?*

Yes. Reasons are necessary so that affected parties may decide whether or not it is appropriate to appeal or review the decision made in relation to the suppression order.

#### Chapter 7 – Jurisdiction, standing, terms of orders, appeals and revisiting orders

45. *Should there be a statutory right of appeal against suppression orders made in the course of a trial?*

Yes. It seems anomalous that a media outlet can appear and make submissions on suppression orders, but due to an accident of fate they are not a "party" to a proceeding and therefore cannot appeal against a refusal of name suppression if it is made by the High Court, as occurred in *Fairfax NZ Ltd v C* [2008] NZCA 39. If open justice is the

appropriate benchmark, then media entities should be given specific standing or appeal rights in relation to suppression issues.

46. *Should the media and or other persons who the court considers have a proper interest in the subject matter of the appeal have a statutory right of appeal in relation to decisions on suppression orders?"*

It is appropriate for accredited media entities to have specific appeal rights, but the committee does not agree with the concept of opening the door wider to "entities with a proper interest". This leaves too much room for debate as to who those entities might be. It should be limited to the parties to the prosecution or proceeding and accredited media entities.

47. *Do you support the idea of a register of suppression orders?*

Yes. It is sensible to have an official register so that mistakes are not made through poor record keeping or oversight of existing orders.

48. *Who should be able to access such a register? Should it be open to public search?*

The committee can see advantages to either option. It is consistent with open access to justice to open such a register to the wider public. However, it also seems prudent to leave it open only to the parties to the litigation and accredited media outlets.

On balance the committee would support open access.

49. *Should any such register be available electronically?*

Yes. If there is to be a register it should be in the most accessible format possible.

50. *If a national register is not practicable, do you have any suggestions for other methods by which information about suppression orders might be disseminated?*

An option might be to inform one centralised media representative.

51. *Do you think that standard form orders for suppression of name would be useful?*

Yes. This would create a system for media and lawyers so it is clear that the standard form name suppression applies in a particular case.

52. *What other practical steps could be taken to improve clarity and accessibility of suppression orders, and to ensure that the endorsements on judgments accurately reflect the terms of the orders made?*

To improve clarity of suppression orders, Judges could simply specify that the terms of the suppression order are exactly as stated in the judgment. For example, the heading on the front of the judgment could simply state "Name suppression applies as stated in paragraph "x" of the judgment".

53. *Should the same legislative right of review apply to the courts' powers under both sections 138 and 140?*

No. The reason why a District Court cannot review its own final suppression order is that it cannot appeal its own decisions. In other words, one Judge is not to review the orders of another Judge. If such a power were introduced in the District Court it might be possible to have a situation of one District Court Judge overturning a decision of another District Court Judge, which does not lead to judicial comity.

#### Chapter 8 – Publication and the challenge of the Internet

54. *Does the risk of jurors obtaining information about an accused or a trial on the Internet suggest the need for greater use of pre-trial suppression orders?*

This question raises a degree of speculation in its wording, i.e. how would the Court become aware of a juror or jurors' inquiry via the Internet in the first place?

If the Court became aware that prospective jurors were making illicit inquiries, how effective could pre-trial suppression orders be in their operation to prevent such an inquiry on the part of an individual juror or jurors?

55. *Should the courts be able to impose suppression orders directed solely at the Internet? If so, how should such orders be framed?*

The committee believes that this exercise is difficult because under the current legislative regime jurors are able to go home during a trial, and during their deliberations. They cannot be scrutinised or overseen, thus making legislative impositions ineffective.

Suppression orders with reference to the Internet are usually specific in their nature, e.g. a "Google search" and thus may not be sufficiently comprehensive to prevent jurors searching other available information sites.

56. *Should a statutory obligation be imposed to the effect that where service providers or content hosts become aware that they are carrying or hosting a publication which is in breach of an order under sections 138 - 140 of the Criminal Justice Act 1985, they must take steps within their means to prevent the material from being further published?*

Whilst this sounds reasonable in theory, there are problems as to the enforceability of such restraints, e.g. how effective such orders would be in practical terms.

Due to the large number of internet service providers, it is unclear how an effective restriction could be imposed on a service provider.

The question arises as to who should formally be responsible for notifying internet service providers or content hosts. For example, it is unclear how a suppression order could be enforced with respect to a blogger who has set up in a foreign country, e.g. Russia. Whilst it might be possible to impose a statutory obligation on major publishing websites (e.g. the *NZ Herald*), it would be more difficult to prevent an amateur blogger from operating in cyberspace.

57. *If so, who should be responsible for formally notifying the service provider or content host?*

The responsibility for notifying the internet service provider of the need to prevent material being published should, in the first instance, be that of the Court. However, if a suppression order is made in court with reference to suppressing information with reference to, say, the *NZ Herald*, then assuming that the *Herald* or its representative are not actually in court at the time any such order is made, the court must somehow effectively and expeditiously communicate the dicta of such order to the relevant media websites. The speed of such communication is vital to prevent information being posted on the internet during any intervening period.

58. *Should publication be defined in the legislation?*

Publication is about the dissemination of information. The manner in which it is conveyed, whether by electronic format or not, should be immaterial. To endeavour to limit publication by refining it may be futile due to the advent of modern technology. To attempt to circumscribe the meaning of ‘publication’ might be counter-productive.

59. *If so, should it include passing information by word of mouth?*

Publication should include passing information by word of mouth.

60. *Do the current suppression provisions extend to suppressing the same information if it is sourced outside the court at another time and from other sources? If not, should the provisions be amended to this effect, and how might such an amendment be phrased?*

This is problematic due to the difficulties of suppression orders in cyberspace generally. There is a need for open justice as a starting point for any argument about suppression, as per s 14 of the New Zealand Bill of Rights Act 1990, with reference to “freedom of expression.... in any form”. If information is sourced from outside the court at some other time and from some other source, it is unclear how effectively a suppression order could be framed in these circumstances. The committee believes that this is too difficult to achieve.

61. *Is there any justification for the inconsistencies in the wording relating to publication in sections 138 - 140? What terminology should be used?*

Legislation, if considered appropriate, should update the wording contained in ss 138-140 of the Criminal Justice Act to include reference to the internet. The legislation may need to incorporate the terminology adopted by internet users. For example, it should include a reference to a “blog”.

62. *Is legislative amendment required to deal with issues of mass distribution by email of material containing information suppressed by court order? If so, what change is required?*

This is too difficult to achieve in many instances due to the immense speed of the dissemination of information via the internet, and the problems associated with finding the origin of that information.

63. *Is the content of the Guidelines, and in particular the standard conditions for television coverage and stills photography which appear in the Schedules, appropriate?*

The current Guidelines refer to mainstream publications via television, radio and newspapers in the main and thus may need to be updated to include references to the internet.

64. *Should the Guidelines be given greater force and effect? If so, should this be by way of rules or regulations?*

Yes. They may need to be given greater force, particularly with reference to non-compliance, i.e. penalty. This comes back to the effectiveness of any rules in preventing information entering the public domain despite the suppression orders made by the court.

#### Chapter 9 – Contempt, offences and penalties

65. *Is section 138(8) necessary?*

There appears to be a duplication between the provisions of s 138(8) of the Criminal Justice Act 1985, s 206 of the Summary Proceedings Act 1957 (relating to summary prosecutions) and s 401 of the Crimes Act 1961 (which covers the District Court exercising its indictable jurisdiction).

It may be that the reason s 138(8) makes a breach of s 138(2)(c) a contempt of Court is to ensure consistency with s 206 of the Summary Proceedings Act and s 401 of the Crimes Act. Be that as it may, it still begs the question as to whether the duplication is necessary.

The committee believes there are two ways of interpreting how Parliament intended ss 138(2)(c) and 138(8) to operate in the District Court.

In the first instance it could be taken as a statutory award of power to treat as a contempt a breach under s 138(2)(c) by giving the Court an open ended power to punish the contempt along the lines of a superior Court exercising inherent jurisdiction. This would mean that a contempt under s 138(2)(c) could in theory invoke a greater penalty than a contempt under s 206 of the Summary Proceedings Act and s 401 of the Crimes Act, which both limit the punishment to a maximum of three months in prison or a fine not exceeding \$1,000.

An example of a penalty in excess of the \$1,000 statutory limit found in s 206 of the Summary Proceedings Act and s 401 of the Crimes Act is found in *Solicitor General v TV3 Network Services Limited* (1998) 16 CRNZ 401, albeit for a contempt under the inherent jurisdiction of the High Court. It seems odd that under s 401 a person who intimidates a juror or witness should have the punishment limited to a \$1,000 fine or a maximum of 3 months in prison, while a member of the public who misbehaves when asked to leave the court should be exposed to a more open ended penalty.

The second interpretation of s 138(8) is that it is intended to work in conjunction with s 206 of the Summary Proceedings Act or s 401 of the Crimes Act. Section 138(8) should read as if it has the following words added to it "...and subject to the punishment set out

in s 206 of the Summary Proceedings Act 1957 or s 401 of the Crimes Act 1961, as appropriate”.

The committee believes the latter interpretation makes the most sense. Further the reason for a breach of s 138(2)(c) being a contempt of court is that it allows the Judge to act immediately, if necessary, by putting the offender into custody (as noted in paragraph 9.3 of the issues paper). It can also, in appropriate cases, enable the Judge to impose further punishment beyond detaining the offender until the court rises.

The value of a contempt finding in terms of judicial control of the court is that in certain circumstances, particularly where the Judge observes the contempt, the court has the ability to impose an immediate punishment. As noted in the commentary in *Adams on Criminal Law* CA401.08, “there is an unresolved question as to whether a finding that a contempt has occurred, and the imposition of a penalty consequent on such a finding, amounts to a conviction”. The authors consider that it is more likely that a finding of contempt and subsequent punishment is not a conviction. A contempt that has occurred in the courtroom and which is observed by the Judge can result in the Judge reaching a finding of contempt on his or her own observations and without the necessity of a formal hearing to establish the facts. Obviously in other cases a formal hearing with proper evidence would be required to establish the facts. (See *Adams on Criminal Law* CA401.03).

By contrast, the other breaches of s 138 are dealt with by way of a specific summary offence. Punishment of those breaches would require information to be filed and the case to proceed in the usual way.

A further observation in terms of the District Court’s ability to deal with contempt of court is whether, notwithstanding its lack of inherent jurisdiction, the District Court’s inherent power to prevent an abuse of its process might extend to it punishing contempt of court outside its express statutory powers. The existence of the District Court’s inherent power to prevent abuse of its process is well established (see *Moevao v Dept of Labour* [1980] 1 NZLR 464, *Bryant v Collector of Customs* [1984] 1 NZLR 280 and *McMenamin v A-G* [1985] 2 NZLR 274). However, given the continued uncertainty as to the exact scope of that inherent power it would be sensible for there to be a clear statutory framework to enable the District Court to prevent contempt of court.

In summary the breach of an order under s 138(2)(c) should be able to be dealt with by the District Court as a contempt of court. It should, however, be made clear that s 138(8) operates in tandem with s 206 of the Summary Proceedings Act or s 401 of the Crimes Act, as appropriate.

The committee notes that s 206 of the Summary Proceedings Act and s 401 of the Crimes Act are similar, but not identical. For example, s 401(1)(a) covers assaulting, threatening and intimidating as well as wilfully insulting. The Summary Proceedings Act equivalent, s 206(a) covers wilfully insulting only. It seems odd that more obvious contempt such as assaulting, threatening and intimidating are not covered in s 206. The range of persons covered under s 401(1) is also wider than s 206(a). For example, under s 401(1) registrars are covered, but not under s 206(a). There appears to be no sound reason for these inconsistencies.

66. *Are further express powers relating to contempt required under the Criminal Justice Act 1985?*

It is important to distinguish between the dual jurisdictions of the District Court; i.e. the distinction between the summary jurisdiction exercised by a Judge sitting alone, versus the indictable jurisdiction where the Judge sits with a jury as the finder of fact.

In the summary jurisdiction, a breach of the provisions of s 138(8), except for s 138(2)(c), could be dealt with by proceeding against the offender by way of summary prosecution because the breach of the order is unlikely to have any material impact on the impartial consideration of the case by the District Court Judge. It would not be unheard of, particularly in smaller centres, that the Judge who made the order prohibiting publication of a name or other details of the case would be the Judge who determined the case. The expectation is that the Judge, notwithstanding his or her prior knowledge of the case, would still be able to hear the case dispassionately and fairly and ignore any publicity from a breach of the orders.

Different considerations apply where a matter is being dealt with in the indictable jurisdiction. It is not uncommon that suppression orders are made early in a proceeding. The orders can apply generally and specifically to aspects of the case considered at pre-trial hearings. In the event that there is a breach of those orders, particularly where it has the potential to prejudice the fair hearing of the upcoming trial, the Judge should have at his or her disposal the power to deal with that breach promptly.

The need for a speedy mechanism for dealing with breaches of suppression orders is made more pressing by the advent of the internet, publication through which can very quickly render enforcement of suppression orders futile. In those circumstances, and particularly given that the vast majority of serious criminal trials occur in the District Court, it makes no sense to have a distinction whereby the High Court has power to deal with matters by way of contempt while the District Court, at least in terms of inherent jurisdiction, does not.

The District Court, at least in its indictable jurisdiction, should have the power to deal with breaches of suppression orders as contempt of court. A statutory framework should be enacted to allow for this.

It is true that the High Court has a supervisory function over inferior courts. To that extent, a breach of a suppression order that occurs in the indictable jurisdiction of the District Court could be brought before the High Court for its sanction. However, given that Parliament has seen fit to have the District Court in its indictable jurisdiction deal with serious criminal offending it makes little sense not to allow the District Court to impose punishment for a breach of its own orders.

67. *Should breaches of orders made under sections 138 - 140 of the Criminal Justice Act 1985 continue to be strict liability offences, so that the offence will be proved unless the defendant can show, on the balance of probabilities, that he or she acted honestly and with due diligence? Or should knowledge or recklessness be required before a breach of an order is established?*

In considering this question, and a number of the ones that follow, it is important to keep in mind what is at stake when suppression orders are breached.

The orders are often imposed so as to ensure that a fair trial takes place, including protecting the interests of witnesses and complainants/victims. Breaching those orders

can in the worst circumstances prevent a fair trial taking place. Depending on what information is revealed they can jeopardise the safety of witnesses. In extreme cases the breach of suppression orders may mean that a trial becomes impossible. That can mean that a complainant, who may be a genuine victim of crime, loses his or her opportunity to see justice done. At the more extreme end of the spectrum breaches of these orders are more akin to perverting the course of justice. There needs to be a clear simple process to ensure that the system of justice is protected, with appropriate penalties that can deal with the worst offences.

The committee has sympathy with the position set out in paragraph 9.9 of the issues paper with liability *prima facie* on the publishing organisation, while allowing a defence of total absence of fault.

However, the committee would favour strict liability rather than having a *mens rea* of knowledge, or recklessness. There is no ability to obtain a search warrant in relation to breaching section 138-140. It is therefore impossible to determine “fault” within the media organisation because you may not search their premises to determine who may have been at fault for breaching the order.

Also, these offences are almost impossible to investigate. For example, when a reporter or editor is spoken to they take legal advice and refuse to answer any questions (as is their right). Following on from that is the inability to obtain a search warrant (except for under s 139A which does have 3 months imprisonment).

68. *Should there be a tiered system of offences and penalties, with higher penalties available for an intentional offence than for an accidental or inadvertent breach?*

The current penalties are inadequate to deal with serious breaches. However, if strict liability is imposed, there should be some limit on the extent of the penalty that follows, particularly in terms of a sentence of imprisonment.

To that extent there is some merit in having a tiered system. The committee suggests that the offence itself should remain a strict liability offence, but that there be a tiered system of penalty so that the more serious penalties are available only if an aggravating feature of knowledge and recklessness is proven. However, that is a sentencing rather than a liability issue.

The committee does not consider that it makes a significant difference whether the offence was premeditated or innocent; the effect upon the “victim” is the same in either case as their name is wrongly published.

The committee recommends an increase in penalties, which should remain financial in nature. The offences should remain strict liability.

69. *Should the penalties for breaches of orders made under section 138 - 140 of the Criminal Justice Act 1985 be increased?*

Yes.

70. *If so, is the proposed level in the Search and Surveillance Bill 2008 appropriate? If not, what level of fine is appropriate?*

The committee is aware that in *Solicitor General v TV3 Network Services* a fine of \$50,000 was imposed for a contempt of court for publication of a television programme that jeopardised a trial. In particular, for corporate offenders, a fine must be such as to act as a real deterrent. The committee suggest a maximum fine for a corporate offender of \$250,000 and for an individual \$50,000.

71. *Should sections 138, 139 and 140 provide for higher fines for bodies corporate?*

Yes, see above.

72. *Should the available penalty for an individual for a breach of section 138, 139 or 140 include a term of imprisonment?*

Yes. In the event of there being tiered penalties, the term of imprisonment should be significantly higher than three months imprisonment. Where an intentional breach has jeopardised a trial, the maximum term of three years or more would be appropriate.

73. *Should section 140 be amended to provide for automatic name suppression where offenders are subject to the police diversion scheme?*

There is no automatic name suppression where a discharge under s106 is granted or where the police in their discretion review a matter and withdraw the charges. There is no reason why there should be automatic name suppression where diversion is granted.

Following the introduction of the police diversion scheme there had been a practice in some courts in New Zealand that name suppression would be granted as a matter of course. This was not a consistent practice throughout New Zealand, and has not been applied consistently within the courts that initially followed it.

That said, there is sense in the views expressed by Wild J and set out in paragraph 9.29 and 9.30 of the issues paper. The committee suggests that the issue of name suppression should be dealt with on a case by case basis under s 140. A compromise position may be to enact legislation providing that the fact that diversion has been granted, is a factor the court should take into account in favour of granting name suppression, but should not be determinative of the application.

74. *Should the registrar retain the power to make a final order for suppression under section 36(1B) of the Summary Proceedings Act 1957?*

The committee agrees with the comments in paragraph 9.35 of the issues paper.

An order under s 140 requires the exercise of judicial discretion. Such an order cannot be properly made simply on the grounds that the informant and defendant agree to it being made. Consent of the parties has never been grounds for a suppression order. Such an approach will lead to unprincipled and inconsistent outcomes. The Judge may make an order under s140 over the objection of the informant, and may make an order under s 140 even though the defendant has not expressly sought it. Final orders under s 140 should be left to the discretion of the Judge.

75. *Should offences under section 56 to 62 of the Land Transport Act 1998 continue to be treated differently in name suppression terms to other offences?*

When considered in isolation, and in terms of the underlying policy, it is understandable why an exception has been made for these cases. Society considers it undesirable, because of the dangers that alcohol-impaired driving presents to the community, to allow people who have exercised their legal right to be intoxicated at the same time to exercise their legal right to drive a car. Accordingly a limit has been set which in some circumstances can be described as arbitrary, in that it does not take into account the ability of individuals to drive with some degree of impairment by alcohol. There will be many individuals who should not be driving even though they are under the legal limit, and there may be some who could drive with comparative safety even though they may be over the limit. Insofar as the campaign to stop drink-driving has required an attitudinal shift amongst otherwise law-abiding citizens, part of that process is the name and shame aspect of publication of offenders' identities.

That said, as a matter of principle it is difficult to see why this exception should be made. S 140 provides Judges with a wide discretion when considering name suppression. One of the factors that a Judge could legitimately take into account is society's attitude towards drink driving, and the efficacy of offenders being named. It is difficult to see how removing s 66 would change the granting of name suppression for drink-driving offences. Mere personal embarrassment at being caught would never be a legitimate ground for name suppression on a charge of this nature.

However, having s 66 in place begs the question of why other more serious offences are not given similar priority.

76. *Are there any other offences that justify a particularly high threshold before name suppression will be granted?*

The committee considers that it is best to leave the issue of name suppression to the discretion of the Judge as exercised under s 140. A wide unfettered discretion can be appropriately exercised taking into account all the circumstances. A hierarchy of offences requiring subtly different standards might lead to unfair outcomes.

The committee hopes that the above comments are of assistance to the Law Commission. If you wish to discuss any matters raised in this letter please contact the committee secretary, Rhyn Visser by phone (04) 472 7837 or email [rhyn.visser@lawsociety.org.nz](mailto:rhyn.visser@lawsociety.org.nz).

Yours sincerely



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**Convener, Criminal Law Committee**