

Name Suppression Orders and Web 2.0 Media: the New Zealand Experience

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1. Introduction

Less than four and a half million New Zealanders inhabit a land mass greater than the United Kingdom with only one metropolitan centre whose population exceeds one million (TNZ, 2011). Most New Zealanders are regular Internet users² and a vibrant blogging culture has developed.³ Consequently, people accused of crimes that attract significant public interest or opprobrium may be easily identifiable within their professional and local communities. As Mount (2006, p.439) observes, 'New Zealand is a small community, and reputations are quickly made and even more quickly destroyed.' Despite exceptions to the common law principle of open justice being statutorily restricted, name suppression in criminal proceedings appears common in New Zealand, although media reporting of high profile cases may distort perceptions of actual practice. Nevertheless, a perception that celebrities, in particular, disproportionately benefit from the privilege of name suppression is widely held enough for the Criminal Procedure (Reform and Modernisation) Bill 2010 ('the Bill') to specifically provide that being well known should not constitute an adequate ground for name suppression.

The possibility of a name suppression order ('NSO') being breached is not a recent development (Chesterman, 1997, p.142; NZLC, 2008, para.[3.50]) but the availability of Web 2.0 or new media, particularly blogging tools, has made this possibility a likelihood. Indeed, in the recent Whale Oil case,⁴ a prominent blogger became the first person in New Zealand to be convicted of breaching an NSO using Web 2.0 media. Since the judge in that case is the country's most 'tech savvy' member of the judiciary⁵ and the author of Harvey (2005), a leading text on Internet law, the case report provides an in-depth analysis of relevant issues.

This paper is about New Zealand's experience of Web 2.0 media and NSOs in criminal trials. First, relevant principles and specific provisions of the Criminal Justice Act ('CJA') 1985 are sketched.⁶ Second, the impact of the Internet on NSOs is considered, with particular reference to offenders who are well known. Third, Whale Oil is discussed. Fourth, relevant provisions of the Bill are outlined. Fifth, the role of NSOs in a context of Web 2.0 media is critically discussed, with particular emphasis on the expectations of freedom of expression and a right to fair trial.

2. Principles and Specific Provisions

2.1 Fundamental Rights and Freedoms

The New Zealand Bill of Rights Act ('NZBORA') 1990 is a non-entrenched, non-exhaustive code of freedoms and rights that may be explicitly ousted by ordinary legislation (NZBORA 1990, s.4.). Nevertheless, consistent interpretation of statutes is preferred (NZBORA 1990, s.6), and the courts are required to develop the common law in accordance with the freedoms and rights affirmed (NZBORA 1990, s.3(a)). The rights and freedoms recorded in NZBORA 1990 are neither hierarchical, nor absolute (NZBORA 1990, s.5), and so must be balanced with each other and the provisions of the wider law.⁷ The provisions of NZBORA 1990 most relevant to this paper are the rights 'to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form' (NZBORA 1990, s.14) and 'to a fair and public hearing by an independent and impartial court' (NZBORA 1990, s.25(a)).

2.2 Open Justice and Freedom of Expression

CJA 1985 does not expressly affirm the principle of open justice; nevertheless, it is axiomatic that, in criminal trials, where the liberty of the defendant is at stake, open justice requires public access and reporting, which is expected to be 'fair and accurate' (NZLC, 2008, para.[1.2]).⁸ Linking the common law with NZBORA 1990, certain decisions have referred to the right to freedom of expression in relation to open justice;⁹ however 'open justice is a distinct consideration ... primarily concerned with the sound functioning of the judicial process in the public interest, whereas freedom of speech is more concerned with the free flow of information'.¹⁰ While the broad principle is that justice should be administered in public, 'this principle is subject to apparent exceptions ... But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done'.¹¹ Consequently, secrecy is only justified if it is shown 'that the paramount object of securing that justice is done would really be doubtful if attainment of the order were not made'.¹² It may, therefore be claimed that in a curial context, 'a fair trial trumps all'.¹³

2.3 CJA 1985

In a criminal trial, a court may make a temporary or permanent order:¹⁴

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 (CJA 1985, s.140(1) and (2)).

Anyone who breaches an NSO 'or evades or attempts to evade any such order' commits an offence and is liable on summary conviction to a fine not exceeding \$1,000 (somewhat less than £500) (CJA 1985, s.140(5)), a penalty which is generally considered 'underwhelming' (Akel et al, 2008, p.20). The offence is one of strict but not absolute liability (Burrows and Cheer, 2010, p.462).

CJA 1985, s.140 grants a court an ostensibly unfettered discretion,¹⁵ however 'the prima facie presumption as to reporting is always in favour of openness' because 'the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately'.¹⁶ An applicant for name suppression must prove 'compelling reasons' or 'very special circumstances'.¹⁷ Damage which is 'out of the ordinary and disproportionate to the public interest' must be present, since criminal proceedings typically distress, embarrass and cause other adverse personal consequences.¹⁸ Generally, circumstances must be 'other than the normal kind of consequences that flow from being accused of serious offending'.¹⁹

Unlike the New Zealand Law Commission ('NZLC'), which has proposed statutory guidelines (see NZLC, 2009, para.[R3]), the courts require each name suppression application to be decided on its own facts and have avoided statements of criteria. Despite this ad hoc approach, factors relevant to an application being approved may be discerned, including (Akel et al, 2008, pp.16-17): triviality of a charge,²⁰ the right to a fair trial, rights of a victim with the same name as the accused, age or mental stability of the offender, prospects of rehabilitation, presumption of innocence and recognition of human dignity in the right to privacy. Factors against name suppression include (Ibid): the possibility of discovering further offending, the media's right to freedom of expression and the public's right to receive information, and public interest in knowing the character of the person seeking suppression. Factors generally considered irrelevant or non decisive include (Ibid): anguish or embarrassment (particularly after conviction),²¹ lack of previous convictions or acceptance of responsibility, the health of an applicant's family, and the weight of the applicant's surname or their standing in the community so that more adverse publicity might be attracted.

CJA 1985 s.140 does not distinguish between different stages of the prosecution process. Nevertheless, the courts may approach name suppression differently at the time of: (1) arrest;²² (2) diversion;²³ (3) before and during the trial; and (4) post-trial. Before the verdict, the presumption of innocence is a 'significant factor to be weighed in the balance of the principles which favour open reporting',²⁴ but is not enough in itself to justify suppression.²⁵ Displacing the presumption of openness is a much less onerous task than when the applicant has been convicted,²⁶ particularly since name publication is also recognised as a punitive or deterrent measure.²⁷ Although the public has a legitimate interest in acquittals, a court is more likely to prohibit publication in the event of an acquittal.²⁸ Name suppression is, then, unusual in the event of conviction for serious crimes, particularly sexual offences.²⁹ In sum, it should be 'exceptional' if an NSO applies during a trial and 'startling' if retained after conviction.³⁰ However, similar to Australian experience (see Kenyon, 2006, pp.280-281), it seems that, notwithstanding principled guidance at an appellate level, lower courts are prepared to entertain name suppression applications far too easily for the media's liking.

2.4 Suppressing Well Known Names

Certain sections of the media argue that NSOs are granted more readily to those well known than to those without a public profile (NZLC, 2008, para.[3.37]), but this contention is not necessarily supported by case law. Indeed, the High Court has rejected the argument that publication of the name of an applicant for an NSO, whose family is well known, would have a greater impact on her than other accused persons, because it would create a distinction, 'wrong in principle or justice',³¹ that persons of particular interest to the media should have pre-trial suppression but those who are unknown should not enjoy the same benefit. Naturally, when people in the public eye are involved in the criminal process, they attract greater publicity than other people. Consequently, since questions of hardship are more likely to arise when a well known person is accused of a crime, the NZLC (2008, para.[3.37] concluded that 'if undue hardship is a relevant factor, the person's status and reputation and the publicity that may result from that is relevant to a determination of whether such hardship is likely to arise'. Nevertheless, NZLC (2009, para.[3.51]) recommended that being well known 'should not be listed as a separate factor [for the courts to take into account] as there is a risk that this may create a special class'.

2.5 Futility and the Internet

Generally, the identity of a person appearing before a court is already in the public domain, it will not be appropriate to grant name suppression.³² The law will not undertake an exercise in futility, which would bring its own authority and processes into disrepute; indeed, justice 'certainly should appear blind, but it should not appear stupid'.³³ In a case involving accusations of sexual abuse against senior policemen that generated highly emotional public reactions,³⁴ the Court of Appeal appears to have tacitly recognised the futility of continuing with an NSO after victims' supporters distributed leaflets outside the court identifying certain co-accused, who were serving sentences for rape (Akel et al, 2008, p.18).³⁵ NZLC (2008, para.[3.50]) noted that the futility of NSOs is particularly relevant to well-known people but also that, even if an NSO 'may not prevent the spread of knowledge, suppression orders always have some effect in limiting it'.

'In terms of risk to a fair trial, the potential impact of the Internet on criminal proceedings therefore depends on the likely conduct of jurors. If information is available on the Internet but jurors do not conduct their own investigations, there is no greater risk of prejudice than with traditional media reports.³⁶ There is 'no simple and fool-proof way for a trial judge to address the availability on the internet of prejudicial material about the defendant',³⁷ but an interim NSO may reduce the risk. If an NSO seeks to maintain a person's anonymity after a verdict has been handed down, the potential for the order being undermined by dissemination of information on the Internet is real. Thus, within 24 hours of Justice Harvey's initial ruling in the Cyber memory case,³⁸ an online search for the suppressed name returned 95 results (NZLC, 2008, para.[8.22]).³⁹

Burrows and Cheer (2010, pp.469-470) summarise the courts' approach to NSOs and the Internet as follows: (1) to avoid futility, an accused person's name being widely known in connection with the matter at the time an NSO is considered may constitute good grounds for declining the application; (2) a person in New Zealand, who leaks a name to an overseas publication, would breach an NSO; (3) a suppressed name appearing on an overseas website will not usually be grounds for revoking an order;⁴⁰ and (4) leading people to an overseas website might constitute an attempt to evade an order,⁴¹ and the operators of the overseas website may commit a crime against New Zealand law.⁴²

4. Whale Oil

Cameron Slater runs the successful blog under the elidible masthead Whale Oil Beef Hooked ('Whale Oil blog'),⁴³ whose discourse is robust and populist. Opposing name suppression for accused persons whom Slater considered unworthy of such protection became one of Whale Oil's causes. However, despite his statement 'I don't agree with name suppression laws and am running a campaign to have them changed',⁴⁴ and evidence that he intended to conduct 'electronic civil disobedience' by identifying certain persons subject to NSOs,⁴⁵ in practice, indirect means of disclosure were used. These methods included recording names in binary code, pictograms, links to online newspaper articles containing 'clues', and 'dog whistle' phrases, notably, the recurring use of the by-line 'Interesting Names', which, to regular readers would indicate a suppressed name.⁴⁶ Eventually, Slater was charged with breaching ten NSOs.

Slater's defence arguments, some of which manifested creativity rather than plausibility,⁴⁷ were given full consideration by Justice Harvey but dismissed. As noted, CJA 1985 s.140 is a strict liability offence and 'Few excuses will be accepted for a breach of a suppression order'.⁴⁸ Although the Whale Oil blog servers were located in Texas, following Australian precedent,⁴⁹ it was held that publication was made in New Zealand where the information was received and comprehended.⁵⁰ Since the wording of CJA 1985, ss.138-141 appears to contemplate the functions and expectations of traditional media, and was enacted before the emergence of Web 2.0 media, the defence argued that the phrase 'report or account' should be limited to the outputs of traditional media.⁵¹ However, the courts have given the phrase 'a liberal interpretation in keeping with the spirit of s 140',⁵² and the judge observed that CJA 1985 'is more aimed towards the wider dissemination of information by means of mass communication media',⁵³ and saw blogs simply as a means of publication. Finally, the disclosures were claimed to fall short of publishing the prohibited details and it was argued that 'in the case of the pictograms and binary code, publication was not in a language that was official ... and therefore was not properly comprehensible'.⁵⁴ (English is New Zealand's de facto official language, whereas Māori and New Zealand Sign Language are statutory official languages.) Judge Harvey responded:⁵⁵

It was still a form of publication that was capable of being understood ... The fact that it may need some intermediate steps such as translation be it from binary or by phonetically interpreting a pictogram matters little.

In a generally well received decision,⁵⁶ Slater was convicted on nine of the ten charges he faced and fined \$750 plus \$130 court costs for each of the convictions, a punishment he described as having 'copped a flogging as best they can with a wet bus ticket'.⁵⁷ Slater has subsequently lodged an appeal to the High Court on grounds that include: Slater was not in court when an NSO was granted; in some cases interim name suppression had expired; since the relevant cases had received media attention, it was not clear that information published on the Whale Oil blog were likely to lead to identification; no evidence that any member of public had identified an accused as a result to the blogs; and Slater had not used the exact names used in the NSOs.⁵⁸

4. The Bill and Other Developments

In early 2011, a 46 year old 'household name', charged with disorderly conduct, was granted an NSO. Several celebrities were speculatively 'out-ed',⁵⁹ and certain clues were published without breaching the terms of the order. Wikipedia became the focus of attention as the person's entry became updated in breach of the NSO, then rectified.⁶⁰ When the interim NSO required renewal, a little known sports presenter revealed his own identity and plausibly denied that he might be considered a 'household name'.⁶¹ This episode brought public attention to relevant provisions of the Bill,⁶² which might otherwise have remained obscure.

The Bill is an omnibus reform and modernisation initiative that, generally following the recommendations of NZLC (2009), includes measures to clarify and strengthen the law relating to the suppression of names and evidence in criminal proceedings.⁶³ The starting point for considering an NSO is an explicit statement of the principle of open justice.⁶⁴ The Bill identifies a range of interests that may justify suppression, including the risk of prejudice to a fair trial.⁶⁵ Broadly, publication must be likely to cause extreme hardship to a defendant or undue hardship to a victim or witness. The fact that a defendant is well known does not, of itself, constitute extreme hardship.⁶⁶ Conviction for breach of an NSO creates a liability for up to six months imprisonment, if committed by an individual, and a fine of up to \$100,000, if committed by a body corporate.⁶⁷ The term 'publish' is not directly defined,⁶⁸ but, while an ISP that stores material breaching a suppression order is implicitly liable as a publisher,⁶⁹ it does not commit an offence unless it 'knows or has reason to believe that the material breaches the relevant suppression order or provision',⁷⁰ and 'does not, as soon as possible after becoming aware of the infringing material, delete the material or prevent access to it'.⁷¹

Understood, particularly in the context of the protracted introduction of ISP responsibilities for illegal downloading,⁷² InternetNZ, whose mandate includes acting as 'advocate for an open and uncaptureable Internet',⁷³ argues the Bill repeats the

defects of the Copyright Act 1994 and may be futile. If, not wholly removed, InterNZ calls for the provision to require actual notice to be served on an ISP.⁷⁴ Likewise, the Telecommunications Carriers' Forum argues:⁷⁵ ISPs have no knowledge or control of the material which is published using their services; and the risk and cost to New Zealand ISPs, as innocent third parties forced to undertake a quasi-regulatory role, needs to be balanced against the likely futility of suppressing information on a global Internet. Furthermore, there are no other similar ISP targeted regimes elsewhere,⁷⁶ and so the proposal is novel and untested. Besides, there is no evidence that such an imposition on New Zealand ISPs is required given historical co-operation with legitimate law enforcement activities.

The claim by the Minister of Justice, Simon Power, that 'It's a bit of a Wild West out there in cyberspace at the moment, because bloggers and online publishers are not subject to any form of regulation or professional or ethical standards',⁷⁷ seems implausible, at least, in relation to NSOs. After all, Slater, the most blatant of the new media opponents to NSOs was convicted, and, once the Bill is enacted, would face serious penal consequences if he continued his campaign. Nevertheless, Power (2010) has charged the NZLC with investigating 'whether either of the two existing industry watchdogs – the Broadcasting Standards Authority and the Press Council – could provide a suitable vehicle for regulating unregulated forms of new media'. The NZLC expects to report back in late 2011.

5. Discussion

'The internet allows everyone to be a publisher. Anyone who has an opinion can post it on the internet',⁷⁸ but, 'if one wishes to take advantage of that opportunity one must necessarily be prepared to fall within the responsibilities that accompany it'.⁷⁹ On the one hand, Justice Harvey considered blogs to be simply another form of mass communication,⁸⁰ but, on the other hand, he stressed the 'interactivity that distinguishes blogs from other static websites and this is an important part of many blogs',⁸¹ and further noted that a feature 'that differentiates a blog from say, a newspaper, is that a blog occupies a continuum of comment where a particular posting or item may start on one day but may continue and develop over a period of time'.⁸² This logic appears to put new media, which are denied certain privileges of traditional media,⁸³ in a disadvantageous position.

Freedom of speech on the Internet can attract a quasi-religious fervour,⁸⁴ particularly among Web 2.0 media actors. However, Internet free speech advocates are to some extent missing the point about NSOs. Courts are not generally seeking to fetter utterance, which appears to be the principal concern of bloggers, many of whom have negligible readerships and are engaged more in monologue than discourse; rather the courts are principally concerned with how information is processed by a select, potential audience of jury members. (The logic here is that absent a jury, absent name suppression except in truly egregious circumstances.) That is why certain Australasian courts have tried 'pinpoint' name suppression.⁸⁵ Some overseas bloggers were outraged by Justice Harvey's decision in the Cyber memory case despite his seeking 'to give the proceedings up to *more* scrutiny rather

than less'.⁸⁶ The aim was to prevent the creation of searchable Internet files that might be used by a jury, not to inhibit free expression. In contrast to the Cyber memory case, based on the reasoning that 'information is available only for those persons who actually search for it', the Victorian Court of Appeal has refused to order traditional media to remove information from their websites, likening web searches to conducting research at the newspaper archives of the State Library.⁸⁷ (Unlike in New Zealand, it is a crime in Victoria for a juror to conduct her own research during a trial.⁸⁸)

Even before the emergence of new media, Chesterman (1997, pp.142-143) asked whether any legal regime 'which purports to control the flow of information to the public is bound in due time to look like King Canute?' But NSOs do not try to oppose irresistible forces of nature or technology; they seek to ensure fair trials which are as much a feature of an open democratic society as freedom of expression. Rather than establishing grounds for fatalistic surrender, universal access to new media tools demands critical reflection on the principles and practices of name suppression.

Conclusion

Despite a fairly robust set of principles being established at an appellate level to ensure name suppression remains an exception to the fundamental principle of open justice, lower courts in New Zealand may grant NSOs too readily. NZLC recommendations informing proposed legislation should keep the lower courts in check, and, unlike certain Australian states, New Zealand continues to respect the autonomy of jurors in the face of the searchable nature of online information. Represented particularly by Justice Harvey's decisions in the Cyber memory and Whale Oil cases, it submitted that the judiciary in New Zealand has made a commendable start in this regard. Likewise the NZLC-inspired reforms to clarify judicial discretion should be welcomed – although holding ISPs liable for the crimes of their clients seems hasty and imprudent. However, referring the intersection of new media and the judicial system to the NZLC for investigation offers the prospect of further analysis and better considered regulation.⁸⁹

References

'About InternetNZ' (nd), InternetNZ <http://internetnz.net.nz/about-us>

Akel, W, Price, S and Stewart, R (2008), *Media Law: Rapid Change, Recent Developments* (Wellington: New Zealand Law Society).

Ball, A et al (2008), *The Internet in New Zealand 2007 Final Report* (Auckland, The Institute of Culture, Discourse and Communication, AUT University).

Ball, A et al (2010), *The Internet in New Zealand: 2007–2009* (Auckland: The Institute of Culture, Discourse and Communication, AUT University).

'Blogger Appeals Conviction and Fines', (2011, 1 March) *New Zealand Herald* (online) http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10709517

Burrows, J and Cheer, U (2010), *Media Law in New Zealand* 6th ed (Wellington, LexisNexis NZ).

Butler, D and Rodrick, S (2007), *Australian Media Law* 3rd ed (Pyrmont NSW, Lawbook Co).

Chesterman, M (1997), 'OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt with in Australia and America', *American Journal of Comparative Law* 109.

Davis, L (2010), 'Paul Chambers Loses Appeal in Twitter Joke Trial' Index on Censorship, <http://www.indexoncensorship.org/2010/11/paul-chambers-lose-appeal-in-twitter-joke-trial/>

Elvidge, A (2008), *Trying Times: The Right to a Fair Trial in the Changing Media Environment* (LLB Thesis) (Dunedin: University of Otago).

Hagan, K (2010, 19 March), 'Media Win Historical Material Appeal' *The Age* (online) <http://www.theage.com.au/victoria/media-win-historical-material-appeal-20100318-qict.html>

Harvey, D (2005), *Internet.law.nz: Selected Issues* 2nd ed (Wellington: LexisNexis).

Hurley, B (2011, 23 January), 'Celebrity Name Suppression Brings Internet Row' *Herald on Sunday* 6.

'Internet Not a Law-Free Zone', (2010) 760 *Law Talk* 11.

InternetNZ (2011), *Submission to the Justice and Electorate (sic) Committee on the Criminal Procedure (Reform and Modernisation) Bill* (Wellington: InternetNZ)

Kenyon, A (2006), 'Not Seeing Justice Done: Suppression Orders in Australian Law and Practice' *Adelaide Law Review* 279.

Lasar, M (2011), 'The Real Internet Censors: Unaccountable ISPs?' *Ars Technica* <http://arstechnica.com/web/news/2011/02/isps-the-off-duty-cops-of-the-world.ars>

'Luddite Judiciary', (2010, October 12) *Southland Times* 6.

Mount, S (2006), 'The Interface between the Media and the Law' *New Zealand Law Review* 413.

Newton, K and Steward, I (2011, 25 January), 'Devlin 'Should Have Owned Up' to Arrest' *The Dominion Post* (online) <http://www.stuff.co.nz/dominion-post/news/4575893/Devlin-should-have-owned-up-to-arrest>

New Zealand Law Commission ('NZLC') (2008), *Suppressing Names and Evidence: Issues Paper* (NZLC IP13) (Wellington: NZLC).

New Zealand Law Commission ('NZLC') (2009), *Suppressing Names and Evidence: Report* (NZLC R109). (Wellington: NZLC).

New Zealand Police (2009), *New Zealand Police Adult Diversion Scheme Policy*, <http://www.police.govt.nz/service/diversion/policy.html>

Power, S (2010, 14 October), 'Law Commission to Review Regulatory Gaps around 'New Media'' (Media release).

Price, S (2010), 'A Whale of a Decision' *MediaLawJournal* <http://www.medialawjournal.co.nz/?p=390>

Robinson, V (2011, 2 January), 'Forty-Somethings Victim of the Celebrity Guess-Who Games' *Sunday Star-Times A2*.

Solove, D (2010), 'Speech, Privacy, and Reputation on the Internet' in Levmore, S and Nussbaum, M (eds) *The Offensive Internet: Privacy, Speech and Reputation* (Cambridge MA: Harvard University Press).

JJ Spigelman, 'The Internet and the Right to a Fair Trial' 6th World Wide Common Law Judiciary Conference, Washington DC, 1 June 2005 http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman010605

Telecommunications Carriers' Forum ('TCF') (2011), *Submission by the Telecommunications Carriers' Forum on section 216 of the Criminal Procedure (Reform and Modernisation) Bill* (Auckland: TCF).

Tourism New Zealand ('TNZ') (2011), 'Key Facts Introduction', <http://www.newzealand.com/travel/about-nz/key-facts/new-zealand-key-facts-home.cfm/>

Wertheim, M (1997), 'The Pearly Gates of Cyberspace' in Elin, N (ed) *Architecture of Fear* (New York NY: Princeton Architectural Press).

'*Whale Oil* May Appeal Convictions', *The New Zealand Herald* (online) http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10673417

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2 See Ball et al (2010, p.3).
3 Ball et al (2008, p.12) reported that one in ten New Zealand Internet users
keeps his or her own blog.
4 Police v Slater DC Auckland CRN 004028329-9833 ('Whale Oil').
5 See 'Internet Not a Law-Free Zone' (2010). In Department for Internal Affairs v
TV Works Ltd DC Auckland CR 08004505568-620, Judge Harvey handed down
New Zealand's first 'digital judgment', a pdf file, embedded, inter alia, with
hypertext links and video clips.
6 New Zealand statutes are available online at <http://www.legislation.govt.nz>
7 Lewis v Wilson & Horton Ltd [2000] 3 NZLR 546 at [43].
8 Of course, open justice does not guarantee objective reporting. See South
Australia's Evidence Act 1929 (SA), s.71B(1) for an attempt to legislate a
degree of fair reporting.
9 Lewis v Wilson & Horton Ltd [2000] at [43]; R v Mahanga [2001] 1 NZLR 641
at [18]; R v Burns (Travis) [2002] 1 NZLR 387 at [7].
10 Television New Zealand v Rogers [2007] NZSC 91 at [117].
11 Scott v Scott [1913] AC 417 at 439.
12 Scott v Scott at 437.
13 R v B [2008] NZCA 130 at [2].
14 See also: CJA 1985, s.139 (victims of certain crimes); CJA 1985, s.139A;
Children, Young Persons, and Their Families Act 1989, s.438 (criminal
prosecutions of children or young persons); Land Transport Act 1998, s.66
(drink and drug related driving offences); and Evidence Act 2006, ss.110-119
(anonymous witnesses). Burrows and Cheer (2010, pp.472-475) identify 16
miscellaneous statutory powers to suppress publication of information.
15 Lewis v Wilson & Horton Ltd at [40].
16 R v Liddell [1995] 1 NZLR 538 at 546-547.
17 Re Victim X [2003] 3 NZLR 220 at [37].
18 Lewis v Wilson & Horton Ltd at [42].
19 Jackson v R [2010] NZCA 506 at [16].
20 Where the charge is 'truly trivial', particular damage caused by publicity may
outweigh any real public interest. See R v Liddell at 547.
21 As the court noted in R v Liddell at 544, 'anguish to the innocent family of an
offender is an inevitable result of many convictions for serious crime'.
22 CJA 1985 does not contemplate persons arrested but not yet charged;
however, publishing the name of a person who has been arrested before they
appear in court may constitute contempt of court (Burrows and Cheer, 2010,
p.465 n.167).
23 See New Zealand Police (2009, p.2). C v Police HC Palmerston North CRI 2007-
454-19, 28 June 2007 is authority for normal grant of an NSO in the event of
diversion but diversion properly seems to be but one factor to be taken into
account when a court considers an application for name suppression.
24 Prockter v R [1997] 1 NZLR 295 at 298.
25 Nobile v Police HC Auckland CRI 2007-404-241, 17 August 2007 at [11].
26 GAP v Police HC Rotorua CRI-2006-463-68, 23 August 2006.
27 Cairncross v WINZ HC Wellington CRI 2006-483-25, 27 September 2006.

28 Lewis v Wilson & Horton Ltd [2000] at [42]. See Burrows and Cheer (2010, p. 454 n.108) for examples of cases where name suppression after conviction was refused.

29 See R v B [2008] NZCA 130 at [21]-[30].

30 J v Serious Fraud Office HC Auckland A 126/01, 10 October 2001.

31 Nobile v Police at [16].

32 Lewis v Wilson & Horton Ltd at [94].

33 Tucker v News Media Ownership Ltd [1986] 2 NZLR 716 at 736.

34 A v R CA301/05; AC295/051; CA310/05 and CA288/05, 12 June 2006. See also R v Rickards, Shipton and Schollum HC Auckland CRI-2005-063-1122, 25 May 2006.

35 In this already highly charged context, no action was taken against the group in breach, whose members stopped distributing the leaflets once they realised that an unfair trial might lead to acquittal. See also Skelton v Family Court at Hamilton [2007] NZHC 273, where no action was taken after a release of court papers overtly breached the principles of natural justice, and Curtis v Solicitor-General [2005] 3 NZLR 121 (HC).

36 NZLC (2008, para.[8.15]).
See Elvidge (2008, pp.17-18) for examples of how information about high profile cases has been communicated in New Zealand. See, also Hagan (2010) on the approach of the Victorian Court of Appeal in News Digital Media & Fairfax Digital Ltd v Mokbel & Director of Public Prosecutions [2010] VSCA 51R.

37 In R v B [2008] NZCA 130 at [79].
Certain Australia states make it an offence for jurors to conduct their own enquiries. See Jury Act 1977 (NSW), s.68C; Jury Act 1995, s.69A (Qld); and Juries Act 2000 (Vic), s.78A(1).

38 Police v K [2008] DCR 853 and related decisions permitted contemporaneous broadcasts but not accounts or stored files on the Internet.

39 See Elvidge (2008, p.35 n.190) for details of how the NSO was breached.

40 In Re X [2002] NZAR 938 at [23]-[27] the court noted that the publication of a suppressed name on an overseas website does not in itself render an NSO futile. Since not everyone would be able to access the information, the NSO would retain some effect and, besides, technology should not be an excuse for avoiding the law.

41 CJA 1985, s.140(5).

42 See Crimes Act 1961, s.7.

43 <http://whaleoil.gotcha.co.nz/>

44 Whale Oil at [180]

45 Whale Oil at [181]

46 Whale Oil at [218]

47 These included: the NSOs were given for improper reasons and so should not be recognised; an NSO no longer applies if a person is discharged; and, as other media provided sufficient information to start an enquiry, the identities fell into the public domain and therefore Slater should not be prosecuted.

48 Burrows and Cheer (2008, p.461).

49 In *Dow Jones v Gutnick* (2002) HCA 56, a defamation case, the High Court of
Australia held that publication took place where the material was downloaded
and comprehended.

50 *Whale Oil* at [19] and [82].

51 *Whale Oil* at [83].

52 Burrows and Cheer (2008, p.463).

53 *Whale Oil* at [88].

54 *Whale Oil* at [162].

55 *Whale Oil* at [117].

56 See, for example, Price (2010). For a critical opinion, see 'Luddite Judiciary'
(2010).

57 See '*Whale Oil* May Appeal Convictions' (2010).

58 See 'Blogger Appeals Convictions and Fines' (2011). The appeal before the
Auckland High Court commenced on 1 March 2011.

59 Robinson (2011).

60 Hurley (2011).

61 Newton and Steward (2011).

62 See Simon Power's statements reported in Robinson (2011).

63 Broadly, the Bill, cl.48 extends the period for which a jury may be elected from
three months to three years. This has an indirect effect on name suppression
as community magistrates and judges can be expected to be immune to
external influences (Butler and Rodrick, 2007, para.[6.320]), such as blogs
purporting to provide information about defendants.

64 The Bill, cl.200(1).

65 The Bill, cl.204(2).

66 The Bill, cl.204(3).

67 The Bill, cl.215.

68 See the Bill, cl.199.

69 The Bill, cl.216(1).

70 In determining whether an ISP 'knows or has reason to believe that material
breaches a suppression order or provision', a court 'must take account of all
relevant matters', including whether the ISP 'has been notified of the alleged
breach'. See the Bill, cl.216(3).

71 The Bill, cl.216(2).

72 Copyright (New Technologies and Performers Rights) Amendment Act 2008,
s.53 enacted new Copyright Act 1994, ss.92A-92E which establish ISP liability
for continuing to provide Internet accounts to repeat infringers. However, in
the face of protests, section 92A was not brought into force and is due to be
replaced by a modified provision requiring copyright owners to seek orders for
suspension of an Internet account at the District Court. See Copyright
(Infringing File Sharing) Amendment Bill 2010, cl.122. For a discussion on ISPs'
behaviour under self-regulating infringement regimes, see Lasar (2011).

73 InternetNZ (nd).

74 InternetNZ (2011, p.8).

75 Telecommunications Carriers' Forum ('TCF') (2011), Submission by the
Telecommunications Carriers' Forum on section 216 of the Criminal Procedure
(Reform and Modernisation) Bill (Auckland: TCF).

76 Compare with Telecommunications Act of 1996, 47 USC §230(c)(1)
(Communications Decency Act, §230).
See Solove (2010, p.26 nn.23 and 24) for arguments against §230 and for a
notice-and-takedown system incorporating penalties for abusers notices to
takedown.

77 Power (2010).
78 Whale Oil at [11]
79 Whale Oil at [135]
80 Whale Oil at [15]
81 Whale Oil at [12]. Cf the Chambers case and how Twitter tweets may be
searched. For an account of the Chambers case, see Davis (2010).
82 Whale Oil at [13]
83 For example, under CJA 1985, s.138(3), an accredited news media reporter may
normally remain when an order is made to exclude the public from a court.
84 See Wertheim (1997, p.296).
85 See *Police v PIK* [2008] NZYC 2 ('Cyber memory case'); *General Television
Corporation Pty Ltd v DPP* [2008] VSCA 49.
86 Burrows and Cheer (2010, p.67).
87 *News Digital Media & Fairfax Digital Ltd v Mokbel & Director of Public
Prosecutions*. As reporting of this case is restricted, the information is taken
from Hagan (2010). As Spigelman (2005) observes: 'It was, of course, always
possible for someone to go to a public library and look up a newspaper index.
It did not happen.' (Spigelman is Chief Justice of New South Wales.)
88 See *Juries Act 2000* (Vic), s.78A(1).
89 The investigation will be led by Professor John Burrows QC, one of New
Zealand's leading media law experts, and Cate Honoré Brett, an ex-editor of a
national newspaper, who is a senior policy analyst at the NZLC.