ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF WITNESS/VICTIM/CONNECTED PERSONS PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CRI 2014-009-002921
[2015] NZHC 511

REGINA

v

AARON RHYS McDONALD

Hearing:	24 November 2014
Counsel:	C J Lange and C Boshier for Crown R K P Stewart for Fairfax New Zealand and Radio New Zealand
Judgment:	18 March 2015

JUDGMENT OF WHATA J

This judgment was delivered by Justice Whata on
18 March 2015 at 1.30 p.m., pursuant to
r 540(4) of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
Raymond Donnelly & Co, Christchurch
Izard Weston, Wellington

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Introduction

[1] Mr McDonald raped and murdered "Jane." He also kidnapped "Samantha and Lucy." I suppressed their names for the purposes of sentencing.[1] Fairfax Media Limited and Radio New Zealand request that I review my decision and permit publication of the names of the victims.

[1] *R v McDonald* [2014] NZHC 2054 at [2].

[2] The application raises several complex issues about the interface between the Criminal Procedure Act 2011 (the Act) and the New Zealand Bill of Rights Act 1990 (NZBORA). The applicants contend that the murder and rape victim is not a "complainant" for the purposes of automatic suppression under s 203 of the Act and that the victims of the kidnap have not suffered "undue hardship" as required by s 202. The meaning afforded to those concepts, in light of the NZBORA, are in focus.

[3] I will also take this opportunity to rule on a request by the *Christchurch Star* for access to the file for the purpose of examining a letter from Mr McDonald to the victim's family.

Background facts

[4] The central background facts and the reasons for my suppression decisions are set out in my sentencing notes as follows:

> [1] Before commencing the sentencing process I wish to address the media about:
>
> (a) The identification of the victims;
>
> (b) The publication of the facts;
>
> (c) The publication of the victim impact statements;
>
> (d) Respecting the privacy of the victims.
>
> [2] I am suppressing the identities of the victims pursuant to ss 202 and 203 of the Criminal Procedure Act 2011. [ ] as a victim of sexual violation is entitled as of right to anonymity. Ms [ ] and Ms [ ] are entitled to name suppression on the basis that further publication of their names would cause disproportionate and undue hardship to them. While this latter course is unusual, I am advised that undue attention has been given to them, to the point of harassment, well beyond the public interest in the offending concerning them, due I think to the murder and rape offending.
>
> [3] I also suppress the publication of the summary of facts under s 205 of the Criminal Procedure Act as it relates to the murder and rape that will shortly be presented by the Crown and essayed in my sentencing notes. The facts of this part of the offending are very distressing to [ ]'s family and their publication would cause undue harm to them. I propose, however, to circulate to the media an edited version of my sentencing notes, including a summary of the offending, for publication purposes at the conclusion of my sentencing. I also grant leave to the media to apply to me in the event that publication of the full summary of facts is still sought.

> [4] Pursuant to s 27 of the Victims' Rights Act 2002 I also direct that the victim impact statements by [ ]'s parents, her partner, and her brother and his partner and by Ms [ ] and Ms [ ] are suppressed as I consider that this is necessary to protect their privacy.
>
> [5] This leads me to the final preliminary issue that I want to address.
>
> [6] I am instructed by counsel that a member of the press media visited the family home of the murder victim on Tuesday morning seeking an interview with the victim's parents as to their reaction to sentencing. That caused significant distress to the mother of the victim. While I acknowledge the significant and important role that the media plays in the public interest, [ ]'s parents have suffered greatly already as a consequence of their daughter's rape and murder. They are in need of privacy. I would like therefore to take the unusual step of reminding the media present therefore that you are obliged to respect the privacy of victims under the Victims' Rights Act and that there is good reason for doing so in this case.

[5] The background to the visit by the press media to the family home of the murder victim is provided by an affidavit of Joanna Norris. The admissibility of this affidavit is challenged by the Crown on the basis that it is essentially inadmissible hearsay evidence. Be that as it may I am prepared to take it into account for the purposes of providing further context to the application.[2]

[6] That evidence indicates that a reporter, Joelle Dally, visited the premises of the murder victim's family, knocked on the door of their residence and as was her usual practice activated her iphone to record a conversation with them. The transcript of the recording is as follows:

> [Door bell x 2]
>
> [Door opens]
>
> Mrs [ ] (N): Hi
>
> Joelle Dally (D):
>
> Hi Mam, I hope I've got the right place. I'm looking for [ ] and [ ].
>
> N: Yes that's us.
>
> D: Oh hi, I'm sorry to bowl up like this. I'm Joelle. I'm from Fairfax Media. I might be covering the sentencing tomorrow, so I just

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[2] I consider that it would have been inconvenient to call Joelle Dally, the reporter who had the exchange with the victim's mother. The contents of the exchange are not contested and it would serve little purpose to require her to prepare an affidavit for the purposes of confirming that the record is accurate.

wanted to find out from the family what they were hoping for tomorrow.

N: Look, I'm sorry, no comment. OK. This is just not, I can't do anything right now. I'm sorry.

D: Yeah, that's alright.

N: If we see you at the thing tomorrow, the police will let you know what we're going to say.

D: OK. Are you thinking of releasing a statement tomorrow?

N: Look, please.

D: I know, I'm sorry.

N: My daughter's been murdered ok, can you please just leave me alone, OK?

D: OK. Yip, sorry.

[Door shuts]

[7] At sentencing I also had the benefit of victim impact statements. Their admissibility and veracity is not challenged. Relevantly [Samantha] states:

> I was shocked when the media put out my name and my picture. I didn't even know his full face and name. I'm afraid to be known by him. I don't want him to recognise me. I want to disappear from him so that he can never ever find me again. I was very angry with the media for not respecting my privacy. I don't want to change my name because I love it. I hate that I have to worry about these things now.

[8] The other kidnap victim, [Lucy] had this to say about media coverage:

> I try to cover up my neck and hide it because of the media hype. I found the media very invading of me as all of a sudden my name and picture was all over the news. They took my picture from Facebook. In Germany the names of victims are never in the news. I was horrified, I didn't want the media hype and I wish they would leave me alone.
>
> The other night I was out for tea with [ ] and we got a taxi. I was sitting in the taxi waiting for the driver to turn around and threaten us. Like having flashback. It was so weird. I didn't feel safe with the taxi driver on our way to the restaurant and then on the way home. Unfortunately it has made me very suspicious of people.

Jurisdiction under the Criminal Procedure Act 2011

[9] For present purposes the Act commences with the context in which publication is prohibited, described at s 195:

> **195 Context in which publication prohibited**
>
> For the purposes of this subpart, publication means publication in the context of any report or account relating to the proceeding in respect of which the section applies or the order was made (as the case may be), and publish has a corresponding meaning.

[10] This is followed by the requirement at s 196 that Court proceedings are generally open to the public, subject to specified exceptions recorded at ss 97, 197 and 198. Section 97 proscribes that only certain identified persons may be present if oral evidence is taken from a complainant in proceedings for an offence of a sexual nature. Section 197 confers a general power to clear a court room, while s 198 provides an exception for representatives of media organisations. Section 199 directs that a court room must be cleared when a complainant in cases of a sexual nature gives evidence, except for specified persons, including the media.

[11] The jurisdiction to suppress the identity of defendants, victims (including connected persons) and complainants is set out in ss 200 – 205 of the Act. Section 200 stipulates that the Court may only suppress the name of a defendant if publication is likely to, among other things, cause extreme hardship to him or her, undue hardship to any victim of the offence or lead to the identification of another person whose name is suppressed. Section 201 however provides that the identity of the defendant in cases concerning incest or sexual conduct with a dependant family member must be suppressed. The purpose of this section is to "protect the complainant".

[12] Section 202 then confers limited jurisdiction on the Court to suppress the identity of witnesses, victims and connected persons in the following terms:

> **202 The Court may suppress identity of witnesses, victims and connected persons**
>
> (1) A court that is hearing a proceeding in respect of an offence may make an order forbidding the publication of the name, address, or occupation of any person who –

(a) is called as a witness; or

(b) is a victim of the offence;

(c) ...

(2) The Court may make an order under subsection (1) only if the Court is satisfied that the publication would be likely to:

(a) cause undue hardship to the witness, victim, or connected persons; or

...

[13] Victim has the same meaning given to it in s 4 of the Victims' Rights Act which states:

victim —

(a) means—

(i) a person against whom an offence is committed by another person; and

(ii) a person who, through, or by means of, an offence committed by another person, suffers physical injury, or loss of, or damage to, property; and

(iii) a parent or legal guardian of a child, or of a young person, who falls within subparagraph (i) or subparagraph (ii), unless that parent or guardian is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned; and

(iv) a member of the immediate family of a person who, as a result of an offence committed by another person, dies or is incapable, unless that member is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned; and

(b) for the purposes only of sections 7 and 8, includes—

(i) a person who, through, or by means of, an offence committed by another person, suffers any form of emotional harm; and

(ii) a parent or legal guardian of a child, or of a young person, who falls within subparagraph (i), unless that parent or guardian is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned; …

[14] Section 202 reflects a legislative policy favouring publication of the identities of victims unless they can show undue hardship. Section 203 and s 204, by contrast, imposes automatic identity suppression in respect of complainants in specified sexual cases and for child complainants generally. Section 203 states:

> **203 Automatic suppression of identity of complainant in specified sexual cases**
>
> (1) This section applies if a person is accused or convicted of an offence against any sections 128-142A or 144A of the Crimes Act 1961.
>
> (2) The purpose of the section is to protect the complainant.
>
> (3) No person may publish the name, address, or occupation of the complainant, unless
>
> (a) The complainant is aged 18 years and older and
>
> (b) the Court, by order, permits such publication.
>
> (4) The court must make an order referred to in subsection (3)(b) if-
>
> (a) the complainant-
>
> (i) is aged 18 years or older (whether or not he or she was aged 18 years or older when the offence was, or is alleged to have been, committed); and
>
> (ii) applies to the court for such an order; and
>
> (b) the court is satisfied that the complainant understands the nature and effect of his or her decision to apply to the court for the order; and
>
> (c) in any case where publication of the identity of the complainant may lead to the identification of the person who is charged with or convicted of the offence, no order or further order has been made under section 200 prohibiting publication of the identity of that person.

[15] Section 204 requires automatic name suppression for complainants and witnesses less than 18 years of age. Suppression under this section, however, ceases on the death of a child complainant or witness. Furthermore, unlike automatic suppression for complainants in sexual offending cases, there is no express statement of purpose, namely to protect the complainant.

[16] Section 207 stipulates that the Court must give reasons for a suppression order and s 208 provides that a suppression order may be made for a limited period

or made permanently. If the period is not specified, then the order shall have permanent effect. Any suppression order may be revoked, varied or set aside by the Court at any time.

[17] I examine the purpose and scheme of s 203 in detail below at [34]. It will evident that complainants in cases of specified sexual offending occupy a special position in this framework. They are specifically exempt from an otherwise clear legislative policy of open court reporting and publication of identity of participants in the criminal process, so as to secure their protection. The evident reasons for this is captured in the report of the Attorney General under the New Zealand Bill of Rights Act 1990:[3]

> The two circumstances where suppression orders are automatic rather that discretionary concern the protection of particularly vulnerable victims and witnesses. I am satisfied that these limitations of s 14 of the Bill of Rights Act are demonstrably justified. Ensuring the privacy of vulnerable victims and witnesses is necessary not only because it behoves any civilised and humane society to protect them, but also in order to encourage future victims and witnesses to come forward and report serious offending that may otherwise go undetected.

[18] The enactment, however, reserves to the Court the discretion to revoke suppression orders that among other things, do not serve the legislative objective.

NZBORA and freedom of speech

[19] Freedom of speech is affirmed by s 14 of NZBORA as follows:

> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[20] Sections 4, 5 and 6 of the NZBORA set the frame for the interpretation of provisions that bear on affirmed rights, including freedom of speech. I return to the significance of this below at [35]. For present purposes it is useful to set them out for ease of reference:

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[3] Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Criminal Procedure (Reform and Modernisation) Bill* (15 November 2010).

4 Other enactments not affected

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

(a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) decline to apply any provision of the enactment—

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5 Justified limitations

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

6 Interpretation consistent with Bill of Rights to be preferred

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Victims' Rights Act 2002

[21] The Victims' Rights Act also forms part of the relevant legislative matrix. Sections 7 and 15, dealing with the privacy rights of victims, state:

7 Treatment

Any person who deals with a victim (for example, a judicial officer, lawyer, member of court staff, Police employee, probation officer, or member of the New Zealand Parole Board) should—

(a) treat the victim with courtesy and compassion; and

(b) respect the victim's dignity and privacy.

[22] Section 10 provides:

10 Enforceability of principles

Sections 7 to 9, and the principles in them guiding the treatment of victims, do not confer on any person any legal right that is enforceable, for example, in a court of law.

[23] Section 15 provides:

> **15 Victim's rights under Privacy Act 1993**
>
> (1) No person may interfere with the privacy of a victim contrary to the Privacy Act 1993.
>
> (2) This section is not limited by section 7, and does not limit or affect, or give any person any rights separate from, or additional to, the Privacy Act 1993.

[24] The Privacy Act 1993 identifies twelve privacy information principles which govern the use of personal information by "agencies". Agency does not include in relation to "news activities" any news medium. Radio New Zealand, however, is not a news medium for the purpose of principles 7 and 8. These principles deal with correction and accuracy of personal information.

Procedure

[25] This is an application by the media pursuant to s 208 to revoke my suppression orders. Section 210 specifies the media have standing in relation to any application to vary or revoke a order for suppression.

[26] I have approached the application on the basis that I may review my previous orders afresh and without the need to find material error.

[27] As to process, when the matter was heard it became clear that further submissions were needed in terms of the fine grained application of NZBORA to the interpretation of s 203. Leave was granted to file further submissions, with the final set lodged with the Court on 17 December 2015.

Case for the applicant

[28] Mr Stewart initially submitted for the media (in short):

(a) The underlying purpose of s 203 of the Act is to protect the "complainant".

(b) A deceased victim of sexual offending cannot be described as a "complainant" in terms of the natural meaning of complainant. Rather

a complainant is "a plaintiff in certain law suits; a person who alleges that a crime has been committed."

(c) The deceased was murdered before she could make any allegation or complaint.

(d) The legislative history reveals that s 203 has its genesis in s 45C of the Criminal Justice Act 1954, initially applying to victims of sexual offending under 16 years. An amendment in 2002 saw a new subsection 139 (1AA) which stated that the purpose of the section was to protect alleged victims of sexual offending. Section 203 replaced s 139. The word "victim" was substituted by the Select Committee with the word "complainant", though the reasons for this are not articulated.

(e) There is limited directly applicable authority, citing *R v Waihape* and *A v District Court Registrar*.[4] The former involved permanent name suppression of a deceased victim's name and in the later Fogarty J rejected the submission that a complainant referred to a person who did or could have complained.

[29] In subsequent written submissions Mr Stewart addresses the implications of the Victims' Rights Act and NZBORA. He contends (in short):

(a) While the Victims' Rights Act recognises a victims dignity and a right to privacy, it grants no rights that can be enforced per se;

(b) Applying Tipping J's six step NZBORA interpretative approach in *Hansen*,[5] Parliament's intended meaning of complainant should be narrowed from:

> Persons upon whom or with whom [a specified sexual offence] has been, or is alleged to have been, committed

To

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4 *R v Waihape* HC Christchurch CRI-2005-009-14252, 17 August 2006; *A v District Court Registrar in Christchurch* (2006) 22 CRNZ 374 (HC).

5 *R v Hansen* [2007] 3 NZLR 1 at [123] (SC).

> Persons upon whom or with whom [a specified sexual offence] has been, or is alleged to have been, committed *and who are not killed by the offender or alleged offender or party to that offending or alleged offending.*

(Emphasis added.)

(c) There is significant public interest in murder victims, including in open public discussion about them as full people with their own identity.

[30] As to the kidnap victims Mr Stewart also submits:

(a) That I erred in holding that the victims had suffered harassment or undue attention, there being no evidence of this.

(b) That in all the circumstances the victims will not suffer and have not suffered undue hardship as a consequence of publication of their names.

Argument for the Crown

[31] Mr Lange and Ms Boshier submit:

(a) The term "complainant" logically refers to a victim of sexual assault and any narrow conception of that term could lead to absurd results, including unjustifiable distinctions being drawn between victims of sexual violation who do or do not in fact complain.

(b) There is no ability to read down "complainant" to mean "living complainant" and s 208 provides that the suppression is permanent, unlike other jurisdictions.[6] The permanent name suppression granted in s 203 is to be contrasted with s 204(2) of the Act, which provides that names of child victims who die may be published.

(c) Like its predecessor, s 203 automatically applies so that it is not a question of weighing competing considerations, such as the principle of

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[6] Compare: Crimes Act 1900 (NSW) s 578A(4)(f) and Sexual Offences (Amendment) Act 1992 (UK) 4 & 5 Eliz.2 c 69, s 1.

open justice or s 14 NZBORA. The exclusive focus is the protection of the victim.[7]

(d) The public interest is vested in what happened and who did it. There is no broader public interest in the identities of the victims, and if the victims' family wishes to have the victim's name published there is a mechanism for that to happen in s 203(3)(b) and (4).

(e) Fogarty J in *A v Registrar District Court at Christchurch* was correct at [31] when he found there was no discernible reason for limiting the term "complainant" to sexual victims who have complained and denying the benefit to those who have not, and at [22] in context found that the term "complainant" refers to persons who are alleged victims of sexual crime.[8]

(f) By operation of s 208, the suppression orders are permanent unless set aside or varied by the Court. They are not limited to the lifetime of the victim.

(g) The Victims' Rights Act does not create legally enforceable rights, and does not displace the principle of open justice.[9] But any conflict between a victim's privacy rights and NZBORA will only arise for consideration in the context of s 202, not s 203.

(h) It is the family's wish that the victim's name remain suppressed.

(i) Complainant simply means the person against whom the offense is committed.

[32] As to the kidnap victims, the Crown submits that undue hardship simply means the mere possibility of hardship that is disproportionate to the purpose which

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7 Citing *R v W* [1998] 1 NZLR 35 (CA) and referring to the Law Commission Issues Paper 13 *Suppressing Names and Evidence,* December 2008 at 4.3 which identifies a wide range of possible impacts on the victims from publicity, including shame, humiliation, embarrassment, possible risks to safety and effects on family and business.

8 *A v Registrar District Court at Christchurch,* above n 4, at [22].

9 Citing *Re Victim X* [2003] 3 NZLR 220 (CA).

justifies publication, namely the public interest in open reporting of court proceedings and the right of freedom of expression.[10]

[33] Mr Lange also emphasised that the kidnap victims have not contravened any laws and the only reason that their names are in the public domain is because they have been the victims of crime. Mr Lange also notes that in respect of both West Coast kidnap victims the media obtained photos from the victims' Facebook pages without enquiry or permission of the victims published those photographs. The victim impact statements then provide a proper basis for finding that they have suffered hardship given the media attention.

Assessment

The meaning of complainant

[34] I propose first to address the suppression of the name of the rape and murder victim. The central issue is whether "complainant" includes an alleged victim of rape and murder for the purpose of s 203 having regard to the right to freedom of expression affirmed by s 14 of the NZBORA.

[35] The applicants employed the six step interpretative approach taken by Tipping J in *R v Hansen* to ascertain whether a meaning of complainant that is consistent with freedom of speech is appropriate in the context of s 203. Helpfully Tipping J provided a summary of these steps as follows: [11]

> Step 1. Ascertain Parliament's intended meaning.
>
> Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.
>
> Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.
>
> Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.

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10 Citing *Beacon Media Group v Waititi* [2014] NZHC 281.

11 *R v Hansen,* above n 5 [92].

> Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
>
> Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted."

[36] Given that Tipping J's approach was broadly similar to the approach taken by Blanchard and McGrath JJ in *Hansen*,[12] I will proceed on the basis that it is binding on me.[13]

Step 1 – Intended meaning (text, purpose and context)

[37] I endorse the media's revised interpretation of the intended meaning of complainant namely: "persons upon whom or with whom [a specified sexual offence] has been, or is alleged to have been, committed."[14] I think it is important to lay out my reasons for adopting this starting point.

[38] The meaning of s 203 and "complainant" must be ascertained from it text and in light of its purpose.[15] Wider context is also informative, including other parts of the Act and legislative history. Section 6 NZBORA requires that a meaning of s 203 and complainant that is consistent with affirmed rights is to be preferred if possible. This directive is, on Tipping J's framework, to be addressed in subsequent steps.

[39] "Complainant" ordinarily connotes a person who complains.[16] But the complainant in the context of criminal proceedings commonly refers to the alleged victim of the offending. To illustrate, Jowett's Dictionary of English Law states:[17]

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12 *R v Hansen,* above n 5, McGrath J at [192], and see Blanchard J at [60].

13 Chief Justice Elias and Anderson J did not agree with this approach in *Hansen*, preferring instead an approach that gives full vent to the directive at s 6 NZBORA, namely that an interpretation that is consistent with the affirmed right is to be applied if it can be done. Their Honours did not consider that s 5 dealing with justified limitations was a rule of interpretation; *R v Hansen,* above n 5, at [13]-[16], [23], [24], [266]. See also *Morse v Police* [2011] NZSC 4 [2012] 2 NZLR 1. It transpires that I come to this approach at Step 5 below.

14 The Crown did not specifically endorse this meaning, but supported a truncated version, namely the person against whom the offending is committed.

15 Interpretation Act 1999, s 5.

16 A Stevenson (ed) *Oxford English Dictionary* (3rd ed, Oxford University Press, Oxford, 2013) vol 1.

> Complainant. The person against whom the offence is alleged to have been committed (whether or not this was also the person who first reported the incident to authorities)

[40] The express purpose of s 203 is to "protect the complainant" in specified sexual offending against ss 128 to 142A or 144A of the Crimes Act 1964.[18] This assumes that complainants in these cases are vulnerable to harm from publication of their identity. The Law Commission paper *Suppressing Names and Evidence* observed that there are a wide range of possible impacts on victims from publicity. These include shame, humiliation, embarrassment, possible risks to safety and effects on family and business.[19] For ease of reference I will refer to this as publicity harm. At first gloss, both of the abovementioned conceptions of "complainant" remain cogent in light of this purpose. On closer inspection however, it is tolerably clear that definition of complainant given by Jowett, which encompasses all alleged victims, better serves the statutory objective. My reasons follow.

[41] Mr Stewart submitted that the objective of the protection afforded by s 203 is to encourage or foster victims to come forward and participate in criminal proceedings without fear of future identification. I agree, but I would add, drawing on the observation in the report of the Attorney-General, that "it behoves any civilised and humane society to protect" vulnerable victims and witnesses. I also consider that this objective would be undermined if protection is afforded only to those persons who in fact complain. For example, victims who do not complain may be discouraged from giving evidence if they apprehend that their identities could be revealed without approval of the Court. The surety afforded by automatic protection to all victims removes this issue in terms of a victim's decision to complain and or to give evidence at trial.[20]

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17 D Greenberg (ed) *Jowett's Dictionary of English Law* (3rd ed, Sweet & Maxwell, London, 2010).

18 Section 203(2).

19 The Law Commission Issues paper 13, *Suppressing Names and Evidence*, December 2008 at 4.12.

20 A similar argument with respect to making name suppression discretionary was rejected by the Supreme Court in *R v Canadian Newspapers Company Limited* [1988] 2 SCR 122 (SCC) at 132 – 133.

[42] Furthermore, as Fogarty J stated in *A v Registrar District Court at Christchurch*,[21] there is no discernible reason to treat victims who complain and those that do not any differently in terms of the protective purpose of s 203. For example, some rape victims or sexually abused children may never in fact make a complaint yet they would remain exposed to the publicity harm that s 203 expressly seeks to avoid.

[43] The legislative history also supports the broader construction. Indeed, until s 203, the persistent phraseology employed by preceding enactments was:[22]

> No person shall publish in any report relating to proceedings commenced in any court in respect of [specified sexual offending], *the name of any person upon or with whom the offence has been or is alleged to have been committed, or any name or particulars likely to lead to the identification of that person*. (Emphasis added.)

[44] The Minister of Justice Geoffrey Palmer described the purpose of this proviso in straight forward terms:[23]

> The purpose of that Bill was to amend the Criminal Justice Act to provide that the name or identifying particulars of victims of specified sexual offences should not be published unless the Court so orders.

[45] An early draft of s 203 (clause 207) defined the affected class using the same phraseology. The section was subsequently changed (without elaboration by Select Committee) to simply state:[24]

> **207 Automatic suppression of identity of victim in specified sexual cases**
>
> …
>
> (2) The purpose of this section is to protect ~~persons upon or with whom an offence referred to in **subsection (1)** has been, or is alleged to have been, committed (for the purposes of this section called the **victim**)~~ the complainant.

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21 *A v Registrar District Court at Christchurch* above n 4. Fogarty J was addressing whether 'complainant' for the purpose of s 185C includes victims who do not complain.

22 Refer s 17 Criminal Justice Amendment Act 1975, inserting s 45C; s 23 Criminal Justice Amendment Act 1980; s 139(1) Criminal Justice Act 1985.

23 (27 August 1985) 465 NZPD 299. Refer also to the comments of Mr East, the member who introduced the Bill extending suppression protection form children to all victims of sexual abuse (17 August 1985) 465 NZPD 3005.

24 Criminal Proceedure (Reform and Modernisation) Bill at page 170.

[46] There is nothing to suggest that the change to complainant served any purpose other than simplification and consistency across the relevant provisions dealing with victims of specified sexual abuse. Indeed, the report of the Attorney General speaks of victims, not complainants.[25]

[47] Finally, a comprehensive concept of complainant is also consistent with the use of that term at s 204(1). This section prohibits the publication of identifying features of a person under 18 years who is a complainant or a witness. Section 204(2) states that despite s 204(1) publication of the identity of the affected child who dies as a result of the offense may be published. This exception presupposes that the child killed by offender is a "complainant" for the purpose of s 204(1).

[48] Given the foregoing, I am satisfied that Parliament's intended meaning of complainant is:

> Persons upon whom or with whom [a specified sexual offence] has been, or is alleged to have been, committed.

[49] I turn then to step 2.

Step 2 – Consistency with freedom of expression

[50] Section 203 plainly derogates from freedom of expression of the media as affirmed by s 14 NZBORA.

Step 3 – A justified limit?

[51] The central issue to resolve under this heading is whether the automatic name suppression of complainants as defined is proportionate to a legitimate statutory objective.[26] Two requirements must be met. The legislative objective must relate to a pressing and substantial concern and the means chosen to further this objective must be proportionate to the attainment of the objective. To be proportionate the

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[25] (27 August 1985) 465 NZPD 292. I refer also to the analysis of Fogarty J in *A v Registrar District Court at Christchurch*, above n 4, at [13] dealing with s 185C, which finds expression in sections 197 and 199 of the Act.

[26] I adopt the approach taken by the Canadian Supreme Court in *R v Canadian Newspapers*, above n 20, cited by Mr Stewart. In that case the Court had to determine whether very similar suppression legislation was demonstrably justified in a free and democratic society, above n 20, at 129. See also the observations of Blanchard J in *Hansen* above n 5, at [64] – [65].

means chosen must be rationally connected to the objective, must impair the right or freedom in question as little as possible and be such that the effects on the limitation of the rights and freedoms are proportional to the objective.[27] As Tipping J put it there must be "a sufficiently important objective, and proportionality of the means chosen to achieve the objective."[28]

(a) Is there a legitimate objective?

[52] Sexual violation is a pressing and substantial concern and the active participation of victims in criminal proceedings assists the prosecution of such offending and the proper administration of justice.[29] Accordingly, the protection of complainants by identity suppression for the purpose of encouraging or fostering victims to report sexual violation is a legitimate objective. There is no dispute about this.

[53] I also consider that the protection of the privacy of victims of serious sexual abuse per se is a relevant factor to be weighed in the balancing exercise. As I will explain protection of privacy is inherently valuable and a matter of public interest.

(b) Is there a rational connection between the means and the objective?

[54] Section 203 seeks to encourage all victims of specified sexual offending to complain and participate in related criminal proceedings. A commensurately broad definition of complainant to maximise the prospect of all victims participating in the criminal process is rationally connected to this objective.

(c) Is the impairment as little as possible?

[55] The question of impairment however brings into frame whether the intended meaning of complainant is too widely cast, bearing in mind that the onus is on those who claim the limit is reasonable and justified to satisfy that this is demonstrably so.[30] The applicants' basic contention is that victims who do not survive the

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27 *R v Hansen*, above n 5 at [64] – [65] per Blanchard J, [121] per Tipping J; [203] – [205] per McGrath J.

28 *R v Hansen*, above n 5 at [121].

29 See also *R v Canadian Newspapers*, above n 20, at 133.

30 *Hansen*, above n 5, per Tipping J at [108].

offending cannot be incentivised to complain, will not suffer from publicity harm and so do not need or benefit from protecting. There is much force to this argument. The paradoxical effect of a victim's murder is that the protection of anonymity has no ongoing personal benefit for him or her. Balanced against this, the applicants approach is backward looking. The proper focal point is to examine whether the promise of anonymity afforded by s 203 will encourage a victim to complain. If so, then s 203 serves its purpose whether or not the victim is subsequently killed by the offender. In this way the correct benchmark of the utility served by s 203 is the number of potential victims of murder who complain, not the number who do not.

[56] I nevertheless accept that the prospect of victims like Jane who were subject to random violence being encouraged to complain by the promise of name suppression is remote. The connection between the objective of fostering their involvement in criminal proceedings and the protection afforded by suppression appears to be very weak in relation to this class of victim. I conclude therefore that the impairment of freedom of speech caused by the intended meaning of complainant appears excessive insofar as it relates to murdered victims of random physical and sexual violence.

(d) Is the limit in due proportion?

[57] Freedom of speech is inherently valuable to our constitutional framework. As McGrath J stated in *Brooker v Police*:[31]

> Freedom of expression is a right which is basic to our democratic system. As the Supreme Court of Canada has said:
>
> > The core values which free expression promotes include self-fulfillment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment.

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[31] *Brooker v Police* [2007] NZSC 30 at [114] citing *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd* [2002] 1 SCR 156 at [32].

[58] The related principle of open justice sounds just as powerfully in favour of media reporting of criminal proceedings.[32] Tipping J put it succinctly in *TVNZ v Rodgers*:[33]

> …unless the case for denial is clear, individual interests must give way to the public interest in maintaining confidence in the administration of justice through the principle of openness.

[59] There is also significant public interest in the prosecution of serious crime, and in particular rape and murder. Mr Stewart referred to a number of high profile victims that amply serve to illustrate that the identification of the victim can be a lodestar for discussion; for example, about the investigation and prosecution of serious criminal offending.

[60] But freedom of speech is not an immutable right or value and may be outweighed by other rights or values and public interest considerations. As Blanchard J observed in *Hansen*:[34]

> And no one would dispute that many of the freedoms enumerated in Part 2, for example freedom of expression, are in practice routinely limited to a greater or lesser extent by other concerns, both within and external to the Bill of Rights, which are demonstrably justified in a free and democratic society.

[61] Helpfully, the specific weighing exercise is cases of sexual offending is not novel. Lamer J observed when speaking for the Canadian Supreme Court:[35]

> While freedom of the press is nonetheless an important value in our democratic society which should not be hampered lightly, it must be recognised that the limits imposed by s. 442(3) on the media's rights are minimal. The section applies only to sexual offence cases, it restricts publication of facts disclosing the complainant's identity and it does not provide for a general ban but is limited to instances where the complainant or prosecutor requests the order or the court considers it necessary. Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainants' identity is concealed from the public. Therefore, it cannot be said that the effects of s 442(3) are such an infringement on the media's

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32 *Rodgers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 at [55]–[56] per Blanchard J; *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at [79] (CA); *TVNZ v R* [1996] 3 NZLR 393 (CA).

33 *Rodgers v Television New Zealand Ltd*, above n 32 at [74] and per McGrath J at [117]-[121].

34 *R v Hansen*, at n 5; see also discussion Andrew and Petra Butler *The New Zealand Bill of Rights: a Commentary* (LexisNexis, Wellington, 2005) at [13.8].

35 *R v Canadian Newspapers Company Limited*, above n 20, at 131 to 132.

> rights that the legislative objective is outweighed by the abridgment of freedom of the press.

[62] Section 203 imposes a similar restriction to s 442(3) on freedom of expression, but I do not think it is available to me in light of leading New Zealand authority[36] to describe the effect of automatic suppression of victim identity on free speech as "minimal." It is relevant also that s 442(3) is contingent on an application by the complainant or the prosecution.[37] By comparison, suppression under s 203 is automatic and likely to have much wider immediate effect. Therefore, while the factors mentioned by Lamer J mitigate the impact of automatic identity suppression, I proceed on the basis that the infringement of freedom of speech caused by s 203 is substantial.

[63] I am nevertheless satisfied that, for the most part, the legislative objective is not outweighed by the impairment of freedom of speech caused by s 203. Putting aside for present purposes the public interest in privacy values, protecting vulnerable victims from publicity harm fosters their involvement in criminal proceeding. This in turn helps secure the proper administration of justice. In order to be fully effective, the enactment must provide surety to all victims, no matter their circumstances, that they are protected. Put another way, no victim should be in doubt about whether they are protected. There are additional benefits of suppressing the identities murdered victims in some cases, for example, where there is more than one victim of sexual offending in the same family.[38] A comprehensive system of protection is therefore in due proportion overall to its objective, bearing in mind, as I have said, that the proper measure of the utility served s 203 is the number of potential murder victims who complain rather than the number who do not.

[64] Turning then to privacy; rape is a gross violation of personal integrity. Although a right to privacy has yet to gain a strong foothold in the common law, publication of intimate sexual acts without the consent of the participants in

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36 *Re Victim X*, above n 9 at [36]; *Lewis v Wilson and Horton* and *TVNZ v R* both above n 32.

37 Criminal Code RSC 1970 c C-34, s 442(3).

38 To illustrate, in *TV3 v R*, the Court refused to revoke suppression of the identities of sexual abuse victims because it would reveal the names of other victims in a context of proposed programme about incest, above n 32. The Court considered that ongoing suppression was justified having regard to the fact that s 139(2) prohibited publication of the names of incest victims, even though the affected persons were not victims of incest.

circumstances where they might expect privacy is highly offensive and prima facie an actionable tort.[39] This tort has its genesis in a central tenet of human rights law, namely the maintenance of the security and dignity of the person.[40] Aspects of the right to privacy also find direct legislative recognition in the Privacy Act and in the Victims' Rights Act. While the latter recognition may not be enforceable per se, it serves to illustrate the importance attached to the privacy of victims by Parliament. Respect for the reputation of others is also recognised as a valid reason to fetter free speech in international law.[41] Against this background, the privacy rights of rape and other sexual abuse victims are engaged at the point of the offending irrespective of whether they are contemporaneously or subsequently killed by the offender.[42]

[65] Plainly the privacy rights of sexual abuse victims must yield to criminal process. The publication of facts of alleged offending at trial is required for the specific purpose of securing transparent trial processes and the public interest in maintaining confidence in the administration of justice. This will ordinarily require publication of the names of alleged offenders, the facts of the offending and in most cases the names of the victim.[43] The relative weakness of privacy values in the face of freedom of speech was affirmed by the majority in the Supreme Court in *Rodgers v Television New Zealand Ltd*.[44] But a victim of serious sexual violation stands in a very different position to an accused. For more than 35 years it has been legislative policy to prevent the publication of identities of sexual abuse victims in criminal trials. A corollary of this is that there is no presumption in our criminal law that the interests of the public to know and of the press to publish outweighs the legitimate privacy interests of victims of specified sexual offending.[45]

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39 *Hosking v Runting* [2005] 1 NZLR 1, (2004) 7 HRNZ 301 (CA).

40 *Boyd v United States* 116 US 616 (1886) at 630; *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2AC 457 at [50].

41 See Article 19(3) International Covenant on Civil and Political Rights Article.

42 For detailed discussion on the significance of privacy rights and values, see *Brooker v Police*, above n 31, per McGrath J at [122] –[129] and Thomas J at [177] and [252]-[254]. Refer also *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.

43 *Re Victim X*, above n 9 at [36]; *TVNZ v R* above n 40.

44 *Rodgers v Television New Zealand Ltd*, above n 32. See also *Brooker v Police*, above n 31, and the paragraphs cited above at n 42.

45 This is to be contrasted to the context confronted by the Supreme Court in *Cox Broadcasting Corporation v Conn* 420 US.469, 95 S.Ct 1029. In that case, the Court rejected the privacy claims of the father of a victim of rape. The Court observed that once private facts are made public through the trial process, freedom of speech will ordinarily prevail. The Court referred to this as 'a privilege in the press to report the events of proceedings' so that the right to privacy is not invaded by any publication made in a court of justice, at 21. But the Court acknowledged

[66] In saying this I am not suggesting that privacy rights of victims of specified sexual offending assume primacy. In reality, the combined mass of freedom of speech and the principle of transparency still weigh heavily against the assertion of such rights, especially in contexts where, as here, the privacy interests of deceased are ostensibly diminished. But for present purposes I think it can be properly assumed that privacy interests per se add further justification to the comprehensive reach of s 203.

[67] Having said all of that, the collateral infringement of free speech caused by protecting murdered victims of random acts of violent sexual offending triggers the requirement to consider whether there is an alternative meaning that might be more consistent with s 14. In short, while I accept that the additional impairment caused by suppression in relation to murdered victims like Jane is small, Parliament's intended meaning is not strictly proportionate to the legislative objective.

Step 4 – Parliament's intended meaning appears excessive

[68] I have found that the meaning of complainant does not appear to be co-extensive with its objective insofar as concerned murdered victims of random physical and sexual offending. It is therefore necessary to address step 5 in order to properly satisfy the direction at s 6 NZBORA to achieve consistency.

Step 5 – If Parliament's intended meaning is an unjustified limit, is a meaning more consistent with s 14 available to the Court?

[69] As Elias CJ observed in *Morse v Police*:[46]

> Section 6 does not look to an ambulatory meaning of an enactment according to whether, on the facts of a particular case to which it is to be applied, it limits rights and freedoms. It requires the enactment itself to be given a meaning consistent with the rights, if it can.

[70] The applicants contend that a definition that excludes murdered victims can be given because such victims do not require ongoing protection. Mr Stewart put it this way in his submissions in reply:

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that different considerations may arise in circumstances where a political institution resolves not to allow public documentation of private information in court proceedings, at 23.

46 *Morse v Police*, above n 13 at [14].

> Once they are deceased, what do they need protection from?

[71] I consider that this approach, as reflected by this rhetorical question, is both flawed and irreconcilable with the clear statutory scheme of s 203. I am satisfied however, that a definition of complainant that excludes victims killed by the offender at the time of the specified sexual offending is reasonably available. My reasons follow, first dealing with the applicants preferred definition.

[72] First, the applicants' definition would not serve the legislative objective. For ease of reference I will repeat it here:

> Persons upon whom or with whom [a specified sexual offence] has been, or is alleged to have been, committed and who are not killed by the offender or alleged offender or party to that offending or alleged offending.

[73] This definition will have the effect of excluding murdered victims from the ambit of s 203. But it will also exclude victims who properly qualify as complainants; for example, victims who complained or gave a statement before they were killed by the offender. They may have been encouraged to complain by the anonymity afforded by s 203. Parliament could not possibly have intended to exclude these victims from the automatic protection afforded by s 203 or remove that protection from them except by order of the Court. Rather, as Ms Boshier noted, s 203 demands ongoing protection of these victims without out further inquiry, except pursuant to s 203(3).[47]

[74] Second, the applicants' reasoning, taken to its logical conclusion, undermines the prescriptive clarity afforded by s 203. There may be other instances where a Judge might be persuaded that a victim did not or does not need ongoing protection. Take for example a person suffering from permanent cognitive impairment as a result of violence caused by the offender, where it may be assumed that they would never complain or benefit (in a cognitive sense) from suppression. On the applicants' argument there would be a proper basis for amending the definition of complainant to exclude them from the ambit of s 203 because their protection will not continue to serve the legislative objective. This outcome is plainly not

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[47] As the Court of Appeal said in *R v W*, when dealing with s 203's predecessor, the enactment assumes that *any* identification of the victim is an unacceptable risk to the welfare of the victim, above n 7 at 40 (emphasis added).

contemplated by s 203. It would also derogate from the strong privacy interests of the victim in this context.

[75] Third, the power of the Court to lift suppression pursuant to s 203(3)(b) provides a mechanism for dealing with changes in circumstances, including the fact that the alleged sexual violation victim has died. It enables the Court to also assess whether the full costs and benefits of ongoing suppression, including the unjustified impairment of freedom of speech. The Court might reasonably conclude on hearing from the affected persons that the section's objective is not served by ongoing suppression, and subject to any rights under s 202, revoke the suppression. The Court in making this decision will then be guided by longstanding principles supporting freedom of expression and the broader legislative policy that ordinarily there must be undue harm to the victims, witnesses or connected persons to qualify for suppression. The murder aspect of the offending is also an additional factor to be considered, as well as the public interest in knowing the victim as people with full lives, as submitted by Mr Stewart.

[76] Accordingly, the applicants' proposed definition of complainant must be rejected.

Victims murdered at the time of the specified offending

[77] As foreshadowed I am however, somewhat reluctantly, satisfied that victims who are murdered at the time of the specified sexual offending may be excluded from the ambit of s 203 without doing violence to its purpose and scheme. The prospect of victims in this class complaining or personally benefiting from the protection afforded by s 203 is remote. The connection to the legislative objective is therefore very weak. The linkage to the time of the offending also ensures that the exclusion is strictly limited to those persons had little or no opportunity to complain, thereby maintaining the integrity of s 203's prescriptive scheme. The case for exclusion for this specific class of victim therefore, unlike that promoted by the applicants, is clear. I also think that this definition accords with experience, and the publication by the police of the identity of murder victims for the purpose of investigation into their murder. While experience is not barometer of legality, I find

it highly unlikely that that Parliament intended to fetter the ability of the police to advance an investigation into the murder of victims of specified sexual abuse by reason of suppression orders relating to reporting on subsequent proceedings. If anything the capacity to publish the identity of victims subject to random violence is more pressing for the purpose of the criminal investigation, than in other contexts, for example domestic violence in the home.

[78] Finally, in the absence of full argument, I have assumed that Jane's privacy rights are not fully engaged following her death. As I have said, the paradoxical effect of the murder is that the rationale for protection of privacy is diminished.

[79] Accordingly, as required by s 6 NZBORA, I consider that a modification of Parliament's intended meaning is necessary and available to achieve proper consistency with freedom of expression affirmed by s 14 of the same Act.

Step 6 – an alternative meaning is reasonably available

[80] I am satisfied that Parliament's meaning (as modified) is preferable to the applicants' proposed definition. In the vast majority of cases, the power at s 203(3)(b) to revoke suppression provides a proper mechanism for addressing the applicants' proportionality concerns. However, I consider that the meaning of the enactment can be interpreted to exclude victims murdered at the time of the specified offending from the ambit of automatic protection. For completeness I have not sought to refine the definition to exclude only victims of random violence. That would invite debate about whether the violence was random. I therefore find that the following definition of complainant better accords with s 14 while maintaining the integrity of s 203:

> Persons upon whom or with whom [a specified sexual offence] has been, or is alleged to have been, committed and who are not killed at the time of the alleged specified sexual offending.

Summary

[81] Based on my consideration of the six step approach in *Hansen,* I conclude that:

(a) Step 1: the intended meaning of "complainant," in light of the context and purpose of s 203, is 'persons upon whom or with whom [a specified sexual offence] has been, or is alleged to have been, committed'.

(b) Step 2: s 203 derogates from the media's freedom of expression.

(c) Step 3: the scheme of s 203 achieves a legitimate impairment of freedom of speech, having regard to the legislative objective to foster all victims to complain and the public interest in privacy values. However, the collateral infringement caused by the suppression of murdered victim's names is disproportionate to the legislative objective, albeit only marginally.

(d) Step 4: I found that the impairment of suppression appears excessive insofar as concerns murdered victims and that it was therefore necessary to address Step 5.

(e) Step 5: I am unable to adopt the applicants' preferred meaning of complainant while adhering to the clear statutory scheme. Section 203 simply does not contemplate the exclusion of a particular class of victim from automatic protection based on judicial assessment of the protection needed by a "complainant" except in accordance with s 203(3)(b). But victims that are killed at the time of the specified offending cannot sensibly be described as having the opportunity to complain or benefit from the protection afforded by s 203. Their privacy interests are also materially diminished. Their inclusion within the ambit of s 203 is not therefore demonstrably justified.

(f) Step 6: Parliament's intended meaning must prevail over the applicants' proposed definition. But an alternative meaning is available which better accords with the directive at s 6 NZBORA while maintaining the integrity of s 203, namely:

> Persons upon whom or with whom [a specified sexual offence] has been, or is alleged to have been, committed and who are not killed at the time of the alleged specified sexual offending.

Should there be ongoing suppression of Jane's identity?

[82] Given my conclusion at [80], I was wrong to find that Jane was subject to automatic suppression. Furthermore, I am closely familiar with the facts of her murder. I have no doubt she had no opportunity whatsoever to complain and the promise of anonymity would have been of no consequence or benefit to her. I turn then to consider whether I should consider basis upon which suppression of Jane's identity might continue. Complicating matters, while the applicant's notice of opposition maintained that suppression could not be granted under either s 203 or 202, argument focused almost exclusively on s 203. Nevertheless, given the passage of time that has elapsed, I consider it is more efficient to resolve this aspect in this judgment. I note also that whatever the result I came to on the interpretation of s 203, the issue of whether ongoing suppression needed to be addressed.

[83] I have come to the view that the family may seek suppression pursuant to s 202. While s 202(3) is awkwardly framed for the purpose of an application by the family to suppress Jane's identity, because the family are defined as a victim under s 4 of the Victims' Rights Act which is adopted in s 5 of the Act for the purposes of suppression, I am satisfied that it is appropriate for the family to seek suppression of Jane's identity.

[84] In order to obtain an order for suppression the family must show undue hardship issue in accordance with the general policy of the Act insofar as concerns victims. I agree with the applicants that it is difficult to justify ongoing suppression of Jane's identity under s 203 given the paradoxical effect of her murder.

[85] The requisite threshold test in this case is whether the family are likely to suffer undue hardship from publication. I have no doubt that the family have and will be likely to suffer harm from further publicity of the victim's identity. The central issue is whether the harm reaches the level of undue hardship.

[86] Helpfully Gilbert J has recently essayed the threshold requirements for undue hardship in *Beacon Media Group Limited v Edward Taika Waititi.* He observed:[48]

> In the present context undue hardship will mean any hardship that is disproportionate to the purpose which justifies publication, namely the public interest in the open reporting of court proceedings and the right to freedom of expression assured by the New Zealand Bill of Rights Act 1990. This is consistent with the approach under the Criminal Justice Act where the principle of open justice was always the starting point.

[87] Ordinarily the principles just mentioned present a compelling case for publication as the Court of Appeal emphasised in *Re Victim X.*[49] But this is not an ordinary case. I do not want to burden the reader (including the victim's family) with a recitation of the facts. I have suppressed parts of them from further publication and there is no challenge to that order. I simply note that Jane was subject to brutal physical and sexual abuse over a number of hours, culminating in her death. Her humiliation and suffering must have been extreme.

[88] I am in no doubt that lengthy mass publicity associated with Jane's suffering and the gross violation of her person aggravated the already devastating effects of the offending on her family. I am also satisfied that the media coverage derogates from the family's right to privacy and their desire to keep safe the remaining vestiges of Jane's dignity. The visit by a reporter to the home of Jane's mother on the eve of sentencing did little to assuage their fears of ongoing publicity harm.

[89] I have also examined whether there are any special features to this case that might mean there is heightened public interest in the identity of the victim. I am conscious of the murder/rape cases highlighted to me by Mr Stewart.[50] It is notable that in some of those cases there were concerns about unresolved criminal investigation or processes. There are no such concerns in this case.

[90] Finally I acknowledge the public interest in understanding Jane's full persona. As I have said, a victim can become, for example, the lodestar for discussion. But balanced against that, the media focus on Jane's last few hours of

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48 *Beacon Media Group Limited v Edward Taika Waititi*, above n 10 at [27].
49 *Re Victim X*, above n 9 at [36].
50 Theresa Cormack, Susan Burdett, Kylie Smith, Emma Agnew, Anne Marie Ellens and Donnell Marie Wood.

life and the denigration of her person is from the family's perspective significantly damaging to her legacy.

[91] Accordingly, when I weigh the qualified impairment of the media's freedom of speech in this case against the demonstrable harm caused by the offending to Jane's family, I am satisfied that the harm caused to them by ongoing publicity surpasses the threshold of undue hardship.

[92] I note for completeness that I have taken into account authority to the effect that suppression of identity which has already been heavily publicised will be rare.[51] But as I have said, the further publicity in this specific context will cause undue harm. I am also fortified by the fact that I am not alone in imposing suppressions orders of this kind in this context.[52]

[93] Accordingly, I am satisfied that an order for permanent suppression of Jane's identity is appropriate in this case.

Kidnap victims

[94] As to the kidnap victims, I accept Mr Stewart's contention that I overstated the level of attention given to them as having reached the point of harassment. I do not resile however from the observation that they had been given undue attention, including, as the Crown notes, uplifting their photos from Facebook for publicity purposes. The further broad context for this observation is that the kidnap victims were travelling from abroad without their usual support structures and as one victim noted, were still fearful that the offender might recognise them.

[95] Nevertheless with the benefit of careful review of the authorities, including *Beacon* and *Re Victim X*[53], I accept that by the time of sentencing I erred in finding that the requisite test for suppression had been properly established because it was not clear that suppression would serve any useful purpose in terms of preventing further harm to them. While the statements of the victims as to their personal

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51 *TV3 v R*, above n 32, at 135.
52 Refer *R v Waihape* above n 4.
53 *Re Victim X*, above n 9 at [36].

circumstances must be considered, including their fear of the offender, there had already been significant coverage of them. In these circumstances a more careful assessment of the type and scale of harm that they might suffer as a consequence of further publicity was required. Having now made that assessment I am not satisfied that ongoing suppression was appropriate.

[96] The suppression orders in respect of the kidnap victims are set aside.

Mr McDonald's letter

[97] Mr Towle of the *Christchurch Star* company has sought a copy of a letter written by Mr McDonald to Jane's mother expressing remorse for murdering her daughter. The original purpose for the request was to include the content in their coverage of the sentencing. The *Christchurch Star* company was aware of the suppression orders and have undertaken to apply the orders to the letter. Ms Bulger, for Mr McDonald had not taken instructions, but she indicated that the letter was produced on the basis that it would be a private communication to the family and was filed with the Court and served on the Crown in furtherance of their duty to do so. She was quite clear in her recollection that the implications of the letter were discussed before being tendered and it was agreed that the letter would not be read out in open Court as it would attract undue attention.

[98] Mr Lange has spoken to Jane's family and they have expressed the view that they oppose the media having access to the letter written by Mr McDonald. The family have not seen the letter and nor do they wish to do so; their view being that during the sentencing the prisoner showed no remorse. They observed that during the break in the proceeding, as he was leaving the Court, Mr McDonald looked up to the public gallery, giving a wink and a thumbs up. It is also said that following sentencing being imposed, Mr McDonald spat on the Court floor. The family view is that publication of the letter would create further upset and anguish to the family. Jane's mother emphasised that at the time that the immediate and wider family needed time to grieve and to come to terms with the loss of their daughter. At that time they wished to start the process without further media publicity.

Assessment

[99] While no rule is cited by Mr Towel I proceed on the basis that access is sought in reliance on r 6.9 of the Criminal Procedure Rules 2012. That rule states:

> **6.9 Restrictions on access**
>
> (1) Any right or permission conferred or given by these rules to access any document, court file, or any part of the permanent court record relating to a criminal proceeding is subject to—
>
> (a) any enactment, court order, or direction limiting or prohibiting access or publication; and
>
> (b) the payment of any prescribed fees for access.
>
> (2) Without limiting the generality of subclause (1), a person may access any document of the kind described in subclause (3) only if a Judge permits the person to do so.
>
> (3) The documents are—
>
> (a) any document containing evidence of a complainant or of a person who gives or intends to give propensity evidence:
>
> (b) electronically recorded documents of interviews with a defendant:
>
> (c) any document that identifies, or enables the identification of, a person if the publication of any matter relating to the person's identity (such as the person's name) is forbidden by an enactment or by an order of the court or a Registrar:
>
> (d) any document received, or any record of anything said, in a proceeding while members of the public are excluded from the proceeding by an enactment or by an order of the court:
>
> (e) any document containing evidence provisionally admitted into evidence and any document containing evidence that has been ruled inadmissible by the court.

[100] The criteria for access are as follows:

> **6.10 Matters to be taken into account**
>
> (1) A Judge may deal with any request or application that requires permission of a Judge or the court to be given on the papers or at an oral hearing, and may grant access in whole or in part and subject to any conditions the Judge thinks appropriate.
>
> (2) In determining a request or an application under this rule, the Judge must consider the nature of, and the reasons for, the application or

> request and take into account each of the following matters that is relevant to the application, request, or objection:
>
> (a) the right of the defendant to a fair hearing:
>
> (b) the orderly and fair administration of justice:
>
> (c) the protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by, or available to, any person:
>
> (d) the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, trials and decisions:
>
> (e) the freedom to seek, receive, and impart information:
>
> (f) whether any document to which the application or request relates is subject to any restriction under rule 6.9:
>
> (g) any other matter that the Judge thinks just.

[101] Plainly, as with the other applications before me, the principle of open justice including encouraging the fair and accurate reporting of and comment on trials and decisions together with freedom to seek and receive and impart information are in focus. An unusual aspect of this request is that the letter produced by Mr McDonald was not read out in Court and any expressions of remorse were ultimately given short shrift by me. I am also conscious of the opposition by the victim's family to the production of the letter so as to avoid still further publicity harm to them.

[102] I have come to the view nevertheless that as the letter was taken into account by me for the purposes of sentencing it should be available to the press for consideration and to affirm the basic policy of transparency in the criminal context. While this will no doubt add additional harm to the victim's family I am not satisfied that it is sufficient to warrant effectively the suppression of a document that was relevant to sentencing.

[103] On that basis I direct that a copy of the letter be made available to the *Christchurch Star*, but subject to the suppression orders that I have made regarding the identity of the victim.

Result

[104] The definition of complainant for the purpose of s 203 is:

> Persons upon whom or with whom [a specified sexual offence] has been, or is alleged to have been, committed who are not killed at the time of the alleged specified sexual offending.

[105] The suppression of Jane's name and identifying factors is nevertheless to remain in place.

[106] The suppression orders in respect of the kidnap victims are set aside. This part of the order will lie in Court for five working days to enable the Crown to signal whether an appeal will be sought and to enable an application for continuing suppression pending appeal to be made.

[107] A copy of Mr McDonald's letter is to be made available to the *Christchurch Star*, subject to the suppression of Jane's name and identifying factors.

Declarations

[108] I invite the parties, by agreement if possible, to provide a draft of agreed declarations for the purpose sealing of this decision. As the parties have not previously submitted on the precise terms of the definition I have come too, I grant leave for substantive comment, provided it does not derogate from the core meaning of that definition.

Costs

[109] Given the significant matters of public interest arising in this matter, I am minded to let costs lie where they fall. If necessary, submissions may be filed within ten working days.