LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Law Commission R 109: Suppressing Names and Evidence

03 December 2009

Starting principles

- Open justice – as a general rule, the courts must conduct their business in public, unless this would result in injustice.
  - Trial open to the public
  - Right of those in attendance to report proceedings to others
- S 14 NZBORA - 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

Exceptions

- The chief object of the courts must be to secure justice – sometimes doing justice in public would frustrate justice itself.

- S5 NZBORA – BORA rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

R 109 considers:

- Suppression of evidence
- Suppression of name or identifying particulars of accused or convicted person
- Suppression of names or identifying particulars of victims, witnesses and others
- Grounds for closing the court
- Jurisdiction, appeals and orders
- Publication and the internet
- Contempt, offences and penalties

Evidence

- S 138: The court may forbid publication of evidence or submissions where it is of the opinion that it is required in the interests of justice, public morality, the reputation of any victim of any alleged sexual offence or offence of extortion, or the security or defence of New Zealand.

- R 109 recommends the court should have the power to suppress evidence or submissions where it is satisfied that:
- the interests of the security or defence of New Zealand so require;
- there is a real risk of prejudice to a fair trial;
- the order is necessary to avoid undue hardship to victims;
- publication would endanger the safety of any person; or
- publication would be likely to prejudice the interests of the maintenance of the law, including the prevention, investigation and detection of offences.
- NO broad “interests of justice” test

Names of accused/convicted people

- Current grounds in s 140: a broad judicial discretion, without statutory criteria.

- Report 109 recommends specifying grounds in legislation, namely:
  - where there is a real risk of prejudice to a fair trial;
  - to prevent undue hardship to victims;
  - to prevent extreme hardship to the accused and/or persons connected with the accused;
  - where publication would endanger the safety of any person;
  - where publication would identify another person whose name is suppressed by order or by law;
  - where publication is likely to prejudice the interests of the maintenance of the law, including the prevention, investigation and detection of offences
  - where publication would cast suspicion on other people that may result in undue hardship.

Issue 1 - celebrity

- Should the fact that publication might have a greater effect on well known people affect suppression decisions?
- *Lewis v Wilson & Horton* – standing of accused not grounds for suppression in the absence of evidence of special harm through publicity
- Report 109 – celebrity should not be a ground for name suppression in itself.
- Need for equality before the law– should be considered in the context of whether publication will cause extreme hardship to the accused.

Issue 2 – interim name suppression

- Problems may arise **at first appearance** – accused may need time to get advice or supporting evidence; arguments may not be presented; judge may not have time to consider them in depth.
- Process required to preserve court's ability to suppress name where justified when more information is available, but to avoid interim orders rolling indefinitely.
- On first appearance, accused should be entitled to interim order for name suppression if s/he advances an arguable case for suppression – order to expire at the next appearance , and should not be renewed unless evidence supporting the grounds is produced.

Issue 3 – pre/post conviction

- Should a different standard apply before, during or after trial?
- "Mud sticks" - before trial, publication of name of an accused may result in irreparable harm to reputation – but accused has not yet had chance to put his or her case
- Does this justify greater limits on open justice pre-trial?
- No different test required – stage of the trial can be taken into account in terms of extreme hardship.

Issue 4 - futility

- Not generally appropriate to grant name suppression where the identity of the accused or convicted person is already in the public domain
- Not all releases of information will result in futility – issues of degree of release, form of publication and proximity to trial
- Futility should be a matter for judicial assessment, not legislation
- Has the internet made suppression futile?

  - "Everyone knows" – really?

  - hundreds of final orders for name suppression last year – all futile?

Issue 5 - the Internet

- Challenges posed by the internet – information is constantly available, retains its "fresh" quality – loses its practical and partial obscurity
- R 109: Where a suppression order is breached by publication on the internet, there should be a statutory obligation on service providers or content hosts to remove or block access to that material.
- Intention of the recommendation relates to locally hosted content, rather than information hosted off-shore.
- Must "become aware" that information is in breach of an order – requirement is to remove or block it "as soon as reasonably practicable."

Future developments?

- LC proposal restricted to locally hosted material
- What issues arise in going further?
- Should/could requirement to remove or block information extend to material hosted on overseas sites?
- One argument: not unlawful in overseas jurisdictions, so unreasonable to block lawfully held material
- On the other hand: people should not be allowed to use the internet to subvert NZ court processes.