Chief Victims Advisor to Government

Research Report

Name suppression processes for victims of sexual violence

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Memorandum

To:	Chief Victim Advisor
From:	Nikki Pender, Barrister
Date:	5 August 2020
Subject:	Research memo on name suppression processes for victims of sexual violence

INTRODUCTION

1. The name suppression of the victim and the offender involved in sexual violence cases are often linked. The law presumes that victims of interpersonal crimes want their names suppressed.[1] Section 201 of the Criminal Procedure Act 2011 provides for automatic suppression of a defendant's identity in incest-related cases with the stated purpose of protecting the complainant. Section 203 in turn provides for automatic suppression of the complainant's identity in all sexual offence cases (including incest).[2] However, some victims believe some offenders use the excuse of 'protecting' the victim to keep the offender's name suppressed. These examples are especially highlighted when the victim and offender have a close relationship.
2. Some victims do not want a defendant to have name suppression and are willing to have their name suppression removed so that people can know who harmed them. Victims often fear an offender can hide under their name suppression and go on to harm others, who have no knowledge of their previous history of harm. Other victims simply want the right to self-report.
3. Section 203(3) allows all complainants to apply to have their own name suppression lifted and s. 201(3) allows complainants in incest cases to apply to have the defendant's name suppression lifted. However, complainants often have to bear the cost of a lawyer if these applications are made after the trial has ended. Some victims have spent thousands of dollars attempting to have their name suppression lifted so that they can tell their story and the public can know who harmed them.
4. The Canadian and Australian approaches to name suppression are different, but each of them gives victims of sexual offending more choice and autonomy than the New Zealand system

[1] The relevant offences under the Crimes Act 1961 are s.128B (sexual violation); s.129 (attempted sexual violation and assault with intent to commit sexual violation); s.129A (sexual conduct with consent induced by certain threats); s.130 (incest)); s.131 (sexual conduct with a dependent family member); s.131B (meeting young person under s16 following sexual grooming); s.132 (sexual conduct with child under 12); s.134 (sexual conduct with young person under 16); s.135 (indecent assault); s. 138 (sexual exploitation of person with significant impairment); and s.144A (sexual conduct with children or young people outside New Zealand).

[2] While s.201 automatically suppresses the defendant's identity when accused or convicted of offences against ss.130-131 of the Crimes Act 1961, s.203 automatically suppresses the complainant's identity when the defendant is accused of a wider range of offences, those against ss. 128-142A or 144A of the Crimes Act. Section 204 in turn provides automatic name suppression for all complainants or witnesses under the age of 18 years.

currently does. A bespoke solution, which combines the best of both systems would be even better. Giving complainants choice at the start of the process and allowing survivors the right to self-report at every stage of the trial process would be empowering for them and would also be more consistent with the principles of open justice and freedom of expression.

RECOMMENDATIONS

4. It is recommended that:

   (a) The name suppression laws that apply to complainants under ss 201 and 203 of the Criminal Procedure Act[3] be replaced with a bespoke combination of the complainant opt-in system that applies in Canada, and the self-reporting rights available in most Australian jurisdictions. These changes would be more empowering of complainants and more consistent with Aotearoa New Zealand's obligations under the New Zealand Bill of Rights Act 1990.

   (b) The law be changed as it applies to derivative name suppression so that whenever the defendant has been given name suppression to protect the identity of a victim, that victim can apply for both their own and the defendant's suppression to be lifted as is currently the case for incest complainants under s. 201 of the Criminal Procedure Act.

BRIEF

Background

5. Under the Victims' Rights Act 2002, victims have the right to express their views on applications for permanent name suppression made by the offender.

6. The Chief Victims Advisor's Te Tangi o Te Manawanui: Recommendations for Reform report recommends that government review the name suppression process with the view to making it easier for victims to opt out of name suppression, and at no cost to the victim as well as provide victims with legal advice on their rights and the long-term implications of name suppression.

7. The proposed research will explore any victim focused alternative name suppression processes from Aotearoa New Zealand and overseas jurisdictions that could fit within the current Aotearoa New Zealand criminal justice system and provide increased safety for not only victim/survivors of crime, but also communities.

8. It will be used initially as an internal resource and be provided to the Minister of Justice and the Under-Secretary to the Minister of Justice.

Objectives

9. The objectives of the research are to:

   (a) Outline a range of victim concerns and consequences for child and adult victims of crime, based on the current name suppression process in Aotearoa New Zealand.

[3] It is also anticipated that the law would amend s. 204 of the Criminal Procedure Act 2011 which grants automatic suppression to witnesses and victims of other crimes who are under 18 years old. We do not envisage that this would change the current practice, as any young witness or victim will still be entitled to a suppression order if they or their parent/guardian request it.

(b) Outline possible alternative victim focused processes from Aotearoa New Zealand and overseas jurisdictions that could fit within the Aotearoa New Zealand criminal justice process.

OPEN JUSTICE

10. All discussions about name suppression start by recognising the principle of open justice. The Supreme Court said in *TVNZ* v *Rogers:*[4]

> [118] Open justice provides critical safeguards in the operation of the criminal justice process. The ability of the public to attend, and the media to report on, what transpires during a criminal trial provides the transparency in the process that is crucial to fulfilment of the protected right to a "fair and public hearing by an independent and impartial court". But it has also been recognised that the public interest served by openness in the administration of justice goes beyond protecting the fundamental rights of those charged with a criminal offence. Openness also helps meet the need to preserve public confidence in the legal system.
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> …
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> [120] There are statutory provisions permitting exceptions to openness which allow, and at times require, the courts to suppress reports of certain evidence and to prohibit identification of offenders and witnesses in certain circumstances. These exceptions are, however, all administered from a starting point that emphasises the importance of open justice and freedom of expression. Orders prohibiting publication of evidence, submissions or even a court's judgment will also be made where that is necessary to protect prejudicial material from affecting the fairness of a trial. Those reasons generally disappear once a trial has concluded. Thereafter a strong onus lies on any person seeking to continue a prohibition on publication to show grounds that justify that course.

11. The New Zealand legislature and courts are subject to the New Zealand Bill of Rights Act 1990. While this is not supreme law, the higher courts are scrutinising legislation more closely and are now prepared to make declarations of inconsistency. It is possible that the automatic statutory suppression imposed by ss 201, 203 and 204 of the Criminal Procedure Act may be scrutinised more closely in future.

12. In its 2009 report on name suppression, the New Zealand Law Commission reviewed s.139 of the Criminal Justice Act 1985, which applied at the time, and said:[5]

> Section 139 operates to protect people who are the victims of the sexual crimes set out in sections 128 to 142A or 144A of the Crimes Act 1961. Where those offences are involved, no publication can be made of the victim's name, or of any name or particulars likely to lead to the identification of that person. However, the court may make an order permitting publication if the victim of the offence is 16 or older, and must make such an order if the victim, being 16 or older, applies to the court to that effect, and the court is satisfied that he or she understands the nature and effect of that decision. If there were two or more victims of an offence, each victim must agree.

[4] *Television New Zealand* v *Rogers* [2008] 2 NZLR 277 at [117] – [118], [120] per McGrath J.
[5] NZ Law Commission *Suppressing Names and Evidence,* Final Report (2009) NZLC R 109 at [4.7] to [4.8].

> Sexual offences are a special category because of their highly personal and sensitive nature. There are real concerns about the low reporting rates for sexual crimes because of the ordeal associated with the trial process. Publication of victims' names would provide a further disincentive to reporting. Automatic name suppression is appropriate, subject to the power of the court to permit publication at the victim's request.

13. The Law Commission recommended that a provision like s.139 be carried over to (what became) the new Criminal Procedure Act 2011.[6] In doing so, while expressly recognising that name suppression laws placed limits on open justice and freedom of expression, the Law Commission did not proceed to consider whether, or to what extent, s.139 was a justifiable limitation under section 5 of the New Zealand Bill of Rights Act 1990.[7]

14. The Law Commission's assumption that the nature of sexual offending necessitates privacy is not universally held nor is the wisdom of suppressing the identity of complainants in such cases without its sceptics. Professor Jamie Cameron summarised these misgivings in a 2003 report:[8]

> The main issue between those who support the naming of victims and those who support anonymity is stigma, and how it can or should be addressed in the context of sexual assault. One view is that sexual offences should be normalized, and from that perspective, special protocols simply perpetuate the stigma and shame of being a rape victim. Nadine Strossen maintains, for instance, that, "*if we are ever to get beyond the situation where rape is seen as stigmatizing, where the victim is seen as 'damaged goods', then we have to stop mythologizing it and treating it as some special kind of crime*." She and others contend that mandatory anonymity implies and encourages the view that rape is disgraceful. Likewise, a former President of the National Organization of Women stated that prohibiting publication "*merely establishes the victim as an outcast*"; she urged others to "*pull off the veil of shame. Print the name*." Though it may be less credible, given that its source has an interest in identifying victims, Michael Gartner of the NBC News argues that, "*by not naming rape victims, we are participating in a conspiracy of silence which does a disservice to the public by reinforcing the idea that there is something despicable about rape*." He added that "[*r]ape is a despicable crime of violence, and rapists are deplorable people*", but rape victims, on the other hand, are "*blameless*." His view of the press role is "*to inform the public, and one way of informing the public is to destroy incorrect impressions and stereotypes"*.

15. However, despite reservations, the Law Commission's cautionary position in 2009 still remains an appropriate starting point. The contrary viewpoint may have some aspirational merit, but there is no evidence that it is currently shared by those experts who work most closely with victims of sexual violence. Even jurisprudence from the US and Canada – where constitutionally entrenched charters of rights place heavy weight on freedom of expression and open justice – recognises that some suppression can protect the welfare of victims as well as guard the administration of justice against the threat of underreported crime.[9] On the other hand, more

[6] A history of the legislation governing name suppression for the identities of complainants in cases involving specified sexual offences in Aotearoa New Zealand is set out in Appendix 1 to this report.
[7] Section 5 says, "*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*".
[8] J Cameron (2004) *Victim Privacy and the Open Court Principle*, a report prepared for the Department of Justice Canada at p. 60.
[9] Cameron (ibid); *Globe Newspaper Co*. v. *Superior Court*, 457 U.S. 596 (1982); *Canadian Newspapers Co*. v. *Canada (A.G.)* [1988] 2 S.C.R. 122.

rights-based analyses have found mandatory suppression to be too inflexible as it allows no room for discretion to be applied to an individual case nor room for attitudes to change.[10]

16. If, in future, there is a decreasing need for name suppression orders in sexual crime cases, that trend should develop organically and, ideally, the system would enable it to do so.

AOTEAROA NEW ZEALAND

17. For forty years Aotearoa New Zealand has, in line with similar jurisdictions, automatically suppressed the identity of complainants in sexual crime cases.[11] This guarantee of privacy was originally mooted in the United Kingdom as a means of addressing the chronic under-reporting of rape and other sexual offences.[12] There is also a prevailing assumption that revealing the identities of victims of sexual violence poses an unacceptable risk to their wellbeing.[13]

18. The courts can permit publication of the identity of adult complainants.[14] A court must make such an order at the request of the complainant provided the court is satisfied that they are over 18, they understand the effects and implications and, to do so, would not risk identifying a defendant who separately has name suppression.[15] Until the 2010s, that power appears to have been rarely invoked.[16] However, there have been an increasing number of orders sought in the past few years. Some complainants are prepared to lift suppression so they can prevent offenders from concealing their own identities.[17] And a recent groundswell of grassroots movements such as #MeToo and #LetHerSpeak have seen survivors choosing to forego anonymity and speak out publicly. The courage of survivors who share their stories inspires others and their stories can provide powerful narratives to counter entrenched rape myths.[18] Yet, the current system creates unnecessary impediments for those who wish to speak out and forces them to spend large amounts of money on legal fees.

19. Suppression orders can fetter open justice, freedom of expression and fair trial rights and are usually made only after careful consideration of the specific circumstances of a case.[19] It is uncommon for victims of non-sexual offences to have their identities suppressed[20] or for details of a sexual nature in a non-criminal context to be suppressed.[21] The mandatory nature of automatic suppression also runs counter to the requirement for reasonable proportionality.[22]

20. The law as it applies to the lifting of derivative name suppression orders is also inconsistent. Complainants in incest cases have the right to apply to have the defendant's suppression lifted;[23]

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[10] *Globe Newspaper Co*. (ibid); S. Hutt, *In Praise of Public Access: Why the Government Should Disclose the Identities of Alleged Crime Victims* (1991), 41 Duke L.J. 368.
[11] The relevant offences under the Crimes Act 1961 are listed in footnote 1 above.
[12] Heilbron Committee *Report on the Law of Rape* (1975 – UK); 24 June 1980 430 NZPD 940 (Paul East MP).
[13] NZ Law Commission *Suppressing Names and Evidence* issues paper, NZLC IP13, December 2008 at [4.3].
[14] Section 201(3) and s.203(3) of the Criminal Procedure Act 2011.
[15] Section 203(4) and (5) of the Criminal Procedure Act 2011.
[16] *Chan* v *Attorney General* [2005] NZAR 135 appears to be the only reported case of an order having been made before the early 2010s.
[17] *Forsyth* v *District Court at Lower Hutt* [2016] 2 NZLR 248, [2015] NZHC 2567; *Cosci* v *District Court at Tauranga* [2017] NZAR 1721, [2017] NZHC 1907
[18] E McDonald and R Souness F*rom "Real Rape" to Real Justice in New Zealand Aotearoa: The reform project* in McDonald, E & Tinsley Y (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (2011) Victoria University Press.
[19] *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441; *R v Liddell* [1995] 1 NZLR 538 (CA); *Scott* v *Scott* [1913] A.C. 417.
[20] *Re Victim X* (2002) 20 CRNZ 194 (CA).
[21] *Scott* v *Scott* (supra, note 19).
[22] *Siemer* v *Solicitor-General* (supra, note 19) at [157].
[23] Section 201(4) Criminal Procedure Act 2011.

however, that right is not automatic in other circumstances where the defendant has been given name suppression to protect the identity of a complainant.[24]

21. The current legal framework arguably impedes the ability of victim/survivors to speak out. As name suppression applies automatically, there is no mandatory requirement to consult with complainants about their individual needs. Some victim/survivors report not being aware of how suppression works and a 2018 study into victims' experiences of the criminal justice system found that most participants could not recall having been consulted about name suppression by the Crown Prosecutor.[25]

22. Those who were consulted about name suppression, however, reported feeling empowered:[26]

> They appreciated the time the prosecutor had taken to explain the benefits and downsides of the automatic name suppression being lifted.
> The participant valued that their views were considered in the decision that was made.

23. The legislation enables complainants over 18 years to apply for an order lifting suppression. However, most victim/survivors do not have access to their own lawyers and, once the trial is concluded, often no longer have the same support networks as they did at trial. Many are intimidated by having to apply for a publication order after the trial ends. The requirement that adult victims of sexual offending must satisfy a Judge that they understand the effects and implications of a publication order can also appear patronising and disempowering.

24. Recent changes brought in under the Criminal Procedure Act 2011 risk revictimizing survivors by giving some defendants the ability to challenge the lifting of victims' name suppression. These changes act as a further impediment and appear inconsistent with the purpose of ss. 201 and 203, which is expressed to be for the benefit of complainants.

DERIVATIVE NAME SUPPRESSION[27]

25. The law should limit the ability of defendants to be granted name suppression on the back of the complainant's automatic suppression. But if that is unavoidable, the defendant's suppression should be as limited in scope and in time as possible.

26. In *W* v *Police*,[28] an order was granted under s 140 of the 1985 Act solely to protect the victim's right to anonymity. The victim was a minor and there was no possibility of an order permitting publication of his identity. Gendall J said:[29]

> I feel bound to order suppression. This is not because the appellant himself would deserve it. None of his medical, social, professional or family circumstances would be sufficient to justify the Court turning away from the presumption of publicity. He is the fortunate beneficiary of an order that I must make to ensure the identity of the victim is protected according to s 139. It is an irony that but for the manner of the detail in the original

[24] *Forsyth* v *District Court at Lower Hutt* (supra, note 17); *Taylor* v *C* [2017] NZCA 372.
[25] Gravitas Research and Strategy Ltd (2018) *Improving the Justice Response to Victims of Sexual Violence: Victims' Experiences*, report commissioned by the NZ Ministry of Justice, at 54-55.
[26] Gravitas (ibid) at 55.
[27] The expression "derivative name suppression", as coined here, refers to the situation where an order has been made to suppress the defendant's identity in order to preserve the anonymity of another person who has name suppression. The automatic statutory suppression of a defendant's identity in incest cases under s.201(3) of the Criminal Procedure Act is one such example.
[28] *W* v *Police* [1997] 2 NZLR 17
[29] *W* v *Police* (ibid) at p. 21.

> newspaper publicity, which the learned District Court Judge referred to as going "close to the wire", there would have been no possible basis to order suppression of name now. I suppose the outcome of this appeal is simply an illustration, or example, of how the concept of freedom of speech and openness of justice can, if stretched when not permitted, lead as is the case here to the press being denied later the right on behalf of, and as surrogates of the public, to publish the name and occupation of the appellant.
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> There will be, not for the appellant's benefit but for the benefit of the victim, an order prohibiting the publication of the name of the appellant and his profession or any particulars likely to lead to the identification of his victim.

27. On appeal,[30] the Court of Appeal observed that, technically, there was no need to grant a separate order under s 140 and that the practice was a pragmatic one. Richardson J said:[31]

> Publication in contravention of s 139(1) is an offence (s 139(3)). Prohibition against publication arises by operation of the statute without the need for obtaining any order. In practice a trial Judge may indicate to counsel and the media in the course of proceedings in sexual cases under ss 128-142A that the statute bars publication of any name or particulars as being likely to lead to the identification of the victim. And in determining an application for a suppression order under s 140 by the defendant or any other person connected with proceedings in respect of any offence the Judge may have to consider whether publication would breach s 139, in which case it is a convenient practice to rule accordingly, as happened in this instance. The media then know where they stand, subject of course to any challenge to any such ruling.

28. Under s. 200(2)(f) of the Criminal Procedure Act, a court can suppress the identify of a defendant if publication would be likely to "*lead to the identification of another person whose name is suppressed by order or by law*". Section 201 automatically prohibits the publication of a defendant's identity in cases of incest even when there may be occasions when a less restrictive suppression order would achieve the same end. However, complainants in incest cases can at least apply under s.201(4) to have the suppression of a defendant lifted if/when they elect to self-identify. The same right is not currently available to other complainants whose own right to anonymity may have resulted in the defendant's name suppression on s. 200(2)(f) grounds. This discrepancy is illogical and imposes an unreasonable limitation on open justice and a complainant's freedom of expression.

29. The Court of Appeal in *Taylor* v *C*[32] said that permanence and finality in suppression orders were desirable because they gave defendants and other participants in the criminal justice system some certainty. However, at the same time it confirmed that there will still be some exceptional circumstances when suppression ought to be lifted or revoked.[33] The Supreme Court has also acknowledged that the conclusion of the criminal trial process does not always bring finality in the eyes of the public.[34] Provided all parties know that derivative suppression orders will lapse if the primary suppression order is ever lifted – ie that they are only designed to last for so long as

[30] *R v W* [1998] 1 NZLR 35
[31] *R* v *W* (ibid) at p. 37.
[32] *Taylor* v *C* (supra, note 17).
[33] Indeed, after Mr. Taylor's successful private prosecution of the police informant known as "Witness C" for perjury, the High Court revoked the earlier suppression order. See too *B* v *NZME Publishing* [2018] NZHC 1042 at [22].
[34] *Television New Zealand* v *Rogers* (supra, note 4) at [116].

a complainant requires the protection of anonymity – then all participants would know that the suppression is temporary and react accordingly.

LESSONS FROM CANADA AND AUSTRALIA

Canada

30. The Canadian Criminal Code does not give automatic suppression to any participant in court proceedings. However, all complainants in sexual cases (regardless of age), witnesses in sexual cases who are under 18 and all other victims who are under 18[35] are entitled to a non-publication order if they request it; the presiding judge must advise them of this right.[36] Once complainants have "opted in", they must apply to the court for a variation of that order if they later decide that they wish to have the suppression lifted.[37]

31. In *R* v *Adams*, following acquittal of the accused, the trial judge purported to revoke the non-publication order on the basis that he had not found the complainant to be credible. This ruling was overturned by the Supreme Court of Canada, which held that such orders were not revocable without the complainant's consent. The SCC also confirmed that the order could be varied or revoked at the request of the complainant as the circumstances giving rise to the original order (ie the wish of the complainant for anonymity) would have materially changed.[38]

32. Therefore, in Canada, judges are still required to order non-publication of a complainant's identity if the complainant wants anonymity and the courts cannot unilaterally vary or revoke such an order. But it is the victim or witness in these cases who makes the decision; it does not apply automatically. In other words, complainants themselves decide whether they require the suppression in their own interests and/or as a precondition to reporting or testifying.
This approach would also allow for tailored orders to meet the specific circumstances of the case.

Australia

33. A recent review in Tasmania showed that, while all legal jurisdictions in Australasia automatically suppress the identities of complainants in sexual cases, all but three (itself, New Zealand and the Northern Territory), enabled victims to self-report.[39] In March 2020, Tasmania amended s.194K of its Evidence Act to incorporate the ability to self-report: now, while it remains an offence to publish details of a complainant's identity without a court order, it is a defence if the complainant is aged 16 or over and gave informed consent to that publication. This defence would not have the effect of lifting the name suppression of any other person, including a defendant; under those circumstances, a separate court order permitting publication would be required.

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[35] Note that the Canadian rules apply not just to complainants in sexual cases but also to any witness in a sexual case who is under 18 years old and also any other victim of crime who is under 18 years old. In New Zealand, s.204 of the Criminal Procedure Act 2011 gives automatic name suppression to all complainants and witnesses under the age of 18, which they can apply to have lifted once they come of age. This paper has focused specifically on adult complainants in sexual crime cases, but a review of the law would be expected to consider the interests of all relevant participants and ensure that the law applies consistently.

[36] (CAN) Criminal Code, R.S.C. 1985, c. C-46, s. 486.4(1). Section 486.4 of the Canadian Criminal Code is set out in full at Appendix 2 to this paper.

[37] *R* v *Adams* [1995] S.C.J. No. 105, 103 C.C.C. (3d) 262 (S.C.C.).

[38] *R.* v. *Adams* (ibid).

[39] Tasmania Law Reform Institute *Protecting the Anonymity of Victims of Sexual Crimes*, issues paper no 18, August 2012; Tasmania Law Reform Institute *Protecting the Anonymity of Victims of Sexual Crimes*, final report no 19 (November 2013); Tasmanian Department of Justice Section 194K of the Evidence Act 2001, discussion paper (2019). A table produced by the Tasmanian Department of Justice is reproduced at Appendix 3 to this paper.

34. This same review considered the Canadian approach but opted not to follow it, noting that Tasmania was not itself subject to a domestic or federal Bill of Rights and did not have to balance the interests of open justice and fair trial rights to the same extent.[40]

CONCLUSION

35. In an ideal world, victims would routinely report crimes and be empowered to give evidence in open court. Unfortunately, statistics continue to show that sexual crimes are significantly underreported when compared to other types of offending. Offering anonymity to complainants in such cases remains an important means of encouraging reporting and supporting those who testify in court. However, the current name suppression laws are not tailored to the circumstances of each case, do not sufficiently accommodate those complainants who choose to be identified and are often extended to defendants who would otherwise be identified.

36. The changes recommended in this paper are a combination of the law which applies in Canada and that which applies in most of Australia. This remodelling is designed to be less of a fetter on open justice and freedom of expression, would give adult complainants more say in name suppression decisions that affect them and would accommodate changes in social attitudes that might render such suppression less necessary in future.

[40] Tasmanian Law Reform Institute final report (ibid) at [4.2.14].

Bibliography

BOOKS & ARTICLES

J. Cameron (2004) *Victim Privacy and the Open Court Principle*, a report prepared for the Department of Justice Canada
https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr03_vic1/index.html

S. Hutt (1991), "In Praise of Public Access: Why the Government Should Disclose the Identities of Alleged Crime Victims" (1991), 41 Duke L.J. 368 https://scholarship.law.duke.edu/dlj/vol41/iss2/5/

E McDonald & Y Tilsley, eds (2011), *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (2011) Victoria University Press.

PUBLIC REPORTS

Chief Victims Advisor to Government (2019) *Te Tangi o Te Manawani, Strengthening the Criminal Justice System for Victims: Recommendations for reform*
https://chiefvictimsadvisor.justice.govt.nz/assets/Documents/Publications/Te-Tangi-Final-PDF.pdf

Gravitas Research and Strategy Ltd (2018) *Improving the Justice Response to Victims of Sexual Violence: Victims' Experiences*, report commissioned by the NZ Ministry of Justice

Heilbron Committee report on the Law of Rape (1975)

NZ Law Commission (2008) *Suppressing Names and Evidence* issues paper, NZLC IP13

NZ Law Commission (2009) *Suppressing Names and Evidence* final report (2009) NZLC R 109

Tasmania Law Reform Institute *Protecting the Anonymity of Victims of Sexual Crimes*, issues paper no 18, August 2012
https://www.utas.edu.au/__data/assets/pdf_file/0009/461988/IP_victim_sex_crimes_A4.pdf

Tasmania Law Reform Institute Protecting the Anonymity of Victims of Sexual Crimes, final report no 19 (November 2013)
https://www.utas.edu.au/__data/assets/pdf_file/0005/461768/S194k_Final_05_A4.pdf

Tasmanian Department of Justice Section 194K of the Evidence Act 2001, discussion paper (2019)
https://www.justice.tas.gov.au/__data/assets/pdf_file/0004/466033/Discussion-Paper-section-194K-Evidence-Act-2001-version_2.pdf

CASES

New Zealand

B v *NZME Publishing* [2018] NZHC 1042

Chan v *Attorney General* [2005] NZAR 135

Cosci v *District Court at Tauranga* [2017] NZAR 1721, [2017] NZHC 1907

Forsyth v *District Court at Lower Hutt* [2016] 2 NZLR 248, [2015] NZHC 2567

Lewis v Wilson & Horton Ltd [2000] 3 NZLR 546

R v Liddell [1995] 1 NZLR 538 (CA)

Re Victim X (2002) 20 CRNZ 194

S v *R* [2020] NZHC 777

Siemer v Solicitor-General [2013] NZSC 68; [2013] 3 NZLR 441

Taylor v C [2017] NZCA 372

Television New Zealand v *Rogers* [2008] 2 NZLR 277

United Kingdom

Scott v *Scott* [1913] A.C. 417

Canada

Canadian Newspapers Co. v. *Canada (A.G.)* [1988] 2 S.C.R. 122
R. v. *Adams*, [1995] S.C.J. No. 105, 103 C.C.C. (3d) 262 (S.C.C.)

United States

Globe Newspaper Co. v. *Superior Court*, 457 U.S. 596 (1982)

Appendix 1- New Zealand Legislative History

1975: LAW CHANGES TO PROHIBIT PUBLICATION OF IDENTITIES OF CHILDREN IN SEXUAL CASES AND DEFENDANTS IN INCEST CASES

The Criminal Justice Amendment Act 1975 no 47 amended the Criminal Justice Act 1954 by inserting a new section 45C that prohibited the publication of the name or identifying details of any complainant aged under 16 years old as well as the name of a defendant where the charges included incest.

> **s.45C Prohibition against publication of names in specified sexual cases**
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> (1) No person shall publish, in any report relating to any proceedings commenced in any Court after the commencement of this section in respect of an offence against any of sections 128 to 134 or sections 136 to 142 of the Crimes Act 1961, the name of any child under the age of 16 years 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 child.
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> (2) No person shall publish, in any report relating to proceedings commenced in any Court after the commencement of this section in respect of an offence against section 130 or section 131 of the Crimes Act 1961, the name of the person accused or[41] convicted of the offence or any name or particulars likely to lead to his identification.
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> (3) Every person who publishes any name or particular in contravention of subsection (1) or subsection (2) of this section commits an offence and is liable on summary conviction to a fine not exceeding $500.

1980: NON-PUBLICATION PROHIBITION IS EXTENDED TO ALL COMPLAINANTS IN SEX CASES

Section 23 of the Criminal Justice Amendment Act 1980 no 21 repealed s. 45C(1) and substituted it with:

> (1) No person shall publish, in any report relating to any proceedings commenced in any Court in respect of an offence against any of sections 128 to 142 of the Crimes Act 1961, 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, unless —
>
> (a) that person is over the age of 16 years; and
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> (b) the Court, by order, permits such publication.

[41] The words “accused or” were inserted by s. 2(2) of the Criminal Justice Amendment Act 1976, no 4.

1985 – A NEW CRIMINAL JUSTICE ACT CARRIES OVER THE NON-PUBLICATION BANS

Section 45C of the 1954 Act was replaced by s.139 of the Criminal Justice Act 1954. It read:

> **139. Prohibition against publication of names in specified sexual cases-**
>
> (1) No person shall publish, in any report or account relating to any proceedings commenced in any court in respect of an offence against any of sections 128 to 142A of the Crimes Act 1961, 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, unless –
>
> (a) That person is of or over the age of 16 years; and
> (b) The Court, by order, permits such publication.
>
> (2) No person shall publish, in any report or account relating to proceedings in respect of an offence against section 130 or section 131 of the Crimes Act 1961, the name of the person accused or convicted of the offence or any name or particulars likely to lead to the person's identification.
>
> (3) Every person commits an offence and is liable on summary conviction to a fine not exceeding $1,000 who publishes any name or particular in contravention of subsection (1) or subsection (2) of this section.

2002: THE VICTIMS' RIGHTS ACT REINFORCES THE RIGHTS OF THE COMPLAINANT

The Victims Rights Act 2002 inserted subsections (1AA) and (1A) before and after s 139(1) and subsections (2A) and (2B) after s.139(2). The new provisions made it clear that the suppression orders were intended to protect complainants and made it mandatory for courts to lift suppression if complainants applied for such an order so long as the court was satisfied that they were 16 years or more and understood the nature and effect of such an order.

When the offences related to incest (meaning both the complainant and defendant had automatic suppression), the court also had to be satisfied that identifying a complainant would not also identify a defendant. Defendants in incest cases were also given the ability to challenge an order permitting publication of a complainant's identity by applying for a suppression order under s.140 of the Act.

> **[**(1AA) The purpose of this section is to protect persons upon or with whom an offence referred to in subsection (1) or subsection (2) has been, or is alleged to have been, committed.**]**
>
> **…**
>
> **[**(1A) However, the court must make an order referred to in subsection (1)(b), permitting any person to publish the name of a person upon or with whom any offence referred to in subsection (1) has been or is alleged to have been committed, or any name or particulars likely to lead to the identification of that person, if—
>
> (a) that person—
>
> (i) is aged 16 years or older (whether or not he or she was aged 16 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 that person understands the nature and effect of his or her decision to apply to the court for such an order.**]**

…

(2A) However, a court must order that any person may publish the name of a person convicted of an offence against section 130 or section 131 of the Crimes Act 1961, or any name or particulars likely to lead to the person's identification, if-

(a) the victim (or, if there were 2 or more victims of the offence, each victim) of the offence-

(i) is aged 16 years or older (whether or not he or she was aged 16 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 victim (or, as the case requires, each victim) of the offence understands the nature and effect of his or her decision to apply to the court for such an order; and

(c) no order or further order has been made under section 140 prohibiting the publication of the name, address, or occupation, of the person convicted of the offence, or of any particulars likely to lead to that person's identification.

(2B) An order made under subsection (2A) in respect of the name of a person, or of any name or particulars likely to lead to the identification of a person, ceases to have effect if-

(a) the person applies to a court for an order or further order under section 140 prohibiting the publication of his or her name, address, or occupation, or of any particulars likely to lead to his or her identification; and

(b) the court makes the order or further order under section 140.

2012: NEW CRIMINAL PROCEDURE ACT ADDS RESTRICTIONS ON COMPLAINANTS' ABILITY TO LIFT SUPPRESSION

Subsections 139(1AA), (1) and (1A) of the 1985 Act were replaced by s.203 of the Criminal Procedure Act 2011 and subsections 139(2), (2A) and (2B) were replaced by s.201 of the Criminal Procedure Act 2011.

The requirements for lifting suppression that applied just to incest cases were also extrapolated to all sex cases. Under s.203(4)(c) and s.201(4)(c), a court is precluded from making an order permitting publication of a complainant's identity if to do so may identify a defendant who has name suppression; subsections 203(5) and 201(5) also give defendants the ability to challenge an order permitting publication of a complainant's identity by applying for a suppression order under s.200 of the Act.

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 of sections 128 to 142A or 144A of the Crimes Act 1961.

(2) The purpose of this 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 or 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.

(5) An order made under subsection (3)(b) ceases to have effect if—

(a) publication of the identity of the complainant may lead to the identification of the person who is charged with or convicted of the offence; and

(b) that person applies to a court for an order or further order under section 200 prohibiting publication of his or her identity; and

(c) the court makes the order or further order under section 200.

201 Automatic suppression of identity of defendant in specified sexual cases

(1) This section applies if a person is accused or convicted of an offence against section 130 or 131 of the Crimes Act 1961.

(2) The purpose of this section is to protect the complainant.

(3) No person may publish the name, address, or occupation of a person accused or convicted of an offence mentioned in subsection (1) unless the court, by order, permits that publication.

(4) The court must make an order referred to in subsection (3) if—

(a) the complainant (or, if there were 2 or more complainants, each 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 (or, as the case requires, each complainant) understands the nature and effect of his or her decision to apply to the court for the order; and

(c) no order or further order has been made under section 200 prohibiting publication of the identity of the person convicted of the offence.

APPENDIX 2 – S. 486.4 OF THE CANADIAN CRIMINAL CODE

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

486.4 (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences

486.4 (2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

486.4 (2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

486.4 (3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

486.4 (4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

APPENDIX 3- AUSTRALIAN COMPARISIONS

The following table was produced by Tasmanian Department of Justice during its own review of the laws protecting the anonymity of complainants in sexual cases.[42]

State/Territory	Act	Section	Details
Australian Capital Territory	*Evidence (Miscellaneous Provisions) Act 1991* (ACT)	Section 74(2)	It is a defence to prosecution for an offence against this section if the person establishes that the complainant consented to the publication before the publication happened.
New South Wales	*Crimes Act 1900* (NSW)	Section 578A(4)(b)	Publication is made with consent of the complainant (being a complainant who is of or over the age of 14 years at the time of publication).
Northern Territory	*Sexual Offences (Evidence and Procedure) Act* (NT)	Section 6	A report made or published concerning an examination of witnesses or a trial shall not reveal the name, address, school or place of employment of a complainant or any other particular likely to lead to the identification of a complainant, unless the court makes an order to the contrary.
Queensland	*Criminal Law (Sexual Offences) Act 1978* (Qld)	Section 10(2)	It is a defence to a proceeding for an offence for a person to prove that, before the relevant statement or representation was made or published, that the complainant authorised in writing the making or the publishing of the statement; and the complainant was at least 18 years; and had capacity to give the authorisation.
South Australia	*Evidence Act 1929* (SA)	Section 71A(4)	A person must not publish unless the alleged victim consents to the publication (but no such consent can be given where the alleged victim is a child).
Tasmania	*Evidence Act 2001 (Tas)*	Section 194K	This provision was amended in March 2020. It is now a defence to a proceeding for an offence for a person to prove that the complainant was over 18 years and gave informed

[42] Tasmanian Government, Department of Justice: Discussion paper: Section 194K of the Evidence Act 2001. The table has been updated to incorporate the subsequent law change in Tasmania.

State/Territory	Act	Section	Details
			consent.
Victoria	*Judicial Proceedings Reports Act 1958 (Vic)*	Section 4(1B)(b)(ii)	If a proceeding in respect of the alleged offence is not pending in a court at the relevant time, it is a defence that the person had permission of the person against whom the offence is alleged to have been committed.
Western Australia	*Evidence Act 1906 (WA)*	Section 36C(6)	Nothing prohibits the publication or broadcasting of matter identifying a complainant if the complainant authorises in writing the publication or broadcasting, and was at least 18 years old at the time of authorisation, and was not a person who, because of mental impairment, is incapable of making reasonable judgments in respect of the publication or broadcasting.

Chief Victims Advisor
to Government